Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ODIE N. FIELDS,

Petitioner,

vs.

MADELEINE K. ALBRIGHT,
Secretary, Department of State,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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173 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals properly ruled that class members do not have a right to opt out of a Rule 23 class settlement?

2. Whether the settlement agreement reached in the case was substantially fair, just and equitable to petitioner as he was entitled under Title VII?

3. Whether the defendant has continued to engage in a pattern and practice of discrimination, harassment and retaliation against the petitioner?

4. Did class counsel provide petitioner with professional legal representation?

PARTIES TO THE PROCEEDINGS

Odie N. Fields, the party named in caption.

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PETITION FOR WRIT OF CERTIORARI

Odie N. Fields, the petitioner in the above captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the District of Columbia Circuit entered on March 27, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on March 27, 1998 and captioned as *Walter J. Thomas, et al. v. Madeline K. Albright* (D.C. Circuit 97-5004, 97-518). A copy of that opinion appears herein as Appendix "A". A timely Petition For Rehearing was filed in the United States Court of Appeals for the District of Columbia Circuit. That Petition for Rehearing was denied on May 27, 1998. (A copy of that order appears herein as App. 26).

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 et seq. The District of Columbia Circuit Court of Appeals had jurisdiction over an appeal from a final judgement of a District Court under 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2000 et seq.

   Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

2. 42 U.S.C. § 2000e-2(a)(1)

   Title VII of the Civil Rights Act of 1964, as amended.

   Prohibits discrimination in employment on the basis of race. Specifically, Title VII makes it unlawful for an employer to "fail to refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . "

3. 42 U.S.C. § 2000e-16(a)

   The Equal Employment Opportunity Act of 1972, as amended.

   Require that all personnel actions affecting federal employees or applicants for employment be free from discrimination. It also requires federal agencies to develop and implement affirmative employment programs plans to eliminate the histories of under representation of women and minorities in the federal workplace.

4. 42 U.S.C. § 2000e-2(a)(2)

5. Title VII makes it unlawful for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . "

6. 42 U.S.C. § 2000e-5(g)(1)

   If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate.

7. Fed. R. Civ P. 23(b)(2)

   The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Odie N. Fields, hereafter just Fields was an intervenor plaintiff and class representative for tenuring in the *Thomas v. Albright* class action lawsuit filed by Walter J. Thomas on behalf of himself and other African American Foreign Service Officers against the United States Department of State, hereafter the Department, in 1986. The claims against the Department are racial discrimination and reprisal in the areas of: post and duty assignment,

performance appraisals, promotions, tenuring, awards and selection out.

Plaintiffs for the class moved for class certification pursuant to Fed. R. Civ. P. 23(b)(2) claiming discrimination on the basis of race (Black) in the Department's policies and practices involving assignments, performance appraisals, promotions, tenuring, awards, selection out and reprisals. Class plaintiffs stated that the class case met the requirements of a (b)(2) because the Department had acted or refused to act on grounds that were generally applicable to the class. . . .

In 1994, class counsel failed to move for certification as directed by the court. Class counsel did however, enter into an agreement with the Department a stipulation of a "no opt out" clause in the proposed settlement and that they would remain silent on the issue of opting out. Another part of the agreement was that they would not represent any clients who chose to opt out.

On January 31, 1996, counsel for the parties signed the consent decree and submitted it to the court for approval. The district court held a Preliminary Fairness Hearing on March 20 and 21, 1996. Class counsel dissuaded Fields from attending because the hearing would probably be limited to lawyers and the judge talking. Fields cancelled his trip to Washington to attend the hearing due to the advice of counsel; however, he submitted a second lengthy document, dated March 20, 1996 outlining his objections to the settlement.

B. Factual History

A Fairness Hearing was scheduled for July 15, 1996, and lasted three days. On June 11, 1996, Fields submitted a third objection to the Court chronicling the reasons for his rejection of the settlement proposal and reasons for opting out or as it appeared, being forced out.

On July 15, 1996, Fields testified that in the manner that he had been treated, he had no other alternative but to reject the settlement proposal and consent decree, and request that the court allow him to opt out. He told the court as he had done in writing that his decision was based on:

> His name being arbitrarily replaced on the reinstatement list and that class counsel had refused to explain the reason. When he telephoned lead counsel Carl Anderson he laughed and told him that he knew but could not tell. He then refused to accept or return Fields' phone calls or reply to his letters. Rick Schlegal, another member of the legal team responded to the inquiry as to why Fields' name had been removed from the reinstatement list by saying that he did not know anything. Fields went on to say that he reminded them of the secrecy surrounding his reinstatement was the same as the secrecy that surrounded his termination. That the only answers the Department would provide him was that the information was "confidential" and that it was "on a need to know basis" and that he did not have a need to know. After which, he discovered that his personnel file had not been reviewed for tenure for three years and that another officer had forged the signatures of other board members. In this situation Fields

learned that he had been arbitrarily replaced by Edith Spruill who was a late comer to the lawsuit.

Fields went on to tell the Court that he and the other officers had not violated any laws, nor had they committed any crimes, even through this ordeal – they only wanted to serve their country. He described how he was promised several awards, including for Valor for heroism for his performance in risking his life to save white officers during the embassy bombing, siege, and evacuation of American personnel in Bogota and that the fact that there were white and he was black did not matter – they were Americans, they were human beings. But, as he was risking his black life to save the lives of those white officers and their families – white officers were at the Department busy reneging on the awards and firing him. Synonymous with reinstatement no one will tell him why. Fields believes that the Court records will show that he may have been betrayed by counsel and denied due process, first through the termination, second through the removal from the reinstatement list and given a small award in lieu of it and third, the reversal of the "opt out" decision by the Appellate Court.

Fields, further informed the Court that the monetary award was a pittance for the losses that he suffered from the unfair treatment in the settlement process particularly when the person who replaced him on the reinstatement list would receive a sizable monetary award, reinstatement, a career, retirement and medical benefits with the potential to earn at least a 100 times what he was being offered. Citing Newberg on

Class Actions Vol. 5, 24-156 . . . "district court has a fiduciary duty to and under the due process principles of the Fourteenth Amendment . . . is consistent with notions of fair play and substantial justice". Vol. 5, 1-44 is what the district court attempted to address when it allowed Fields to opt out of the class settlement.

There were other actions by class counsel which should be questioned as the Department's appeal brief to the Circuit Court is scrutinized, [p]laintiffs filed a renewed motion for Class Certification . . . under Rule 23(b)(2) or 23(b)(3). . . . The Department did not brief or even oppose plaintiffs motion. . . . Brief for Appellate Madeline Albright no. 97-5004, 97-5018 (DC Cir). In a curious move, Class Counsel rushed to stipulate a no opt out clause in the consent decree over the protests of their clients, then signed a letter to remain silent on the issue with a guarantee to not represent anyone who might opt out. Counsel had forced their clients into an unfair position of accepting the terms of the settlement.

On November 7, 1996, the Court issued a decision approving the settlement pursuant to Rule 23(b)(2) Vol. I § 1.19, 1-47. "no express opt out right is granted or prohibited under Rule 23(b)(1) or (2)"; *Witzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Petway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974). "All that need to be determined is the conduct of party opposing the class is such as makes such equitable relief appropriate. There is no limitation on the power of the Court to grant other relief to the established class, especially where it is required by

Title VII . . . " The trial Judge recognized the arbitrary manner in which the reinstatement list was established by limiting the number to four. He wrote a letter to Warren Christopher the Secretary of State to reconsider the Department's "position" and reinstate Fields and other officers specifically addressing Fields. The Department refused his requests citing concerns about preferential and unfair treatment.

The Department later contacted Fields to invite him to apply for consideration of reinstatement review by a special panel with the condition that if he was reinstated it would be to a demoted junior officer level and status, loss of back pay and benefits; and forfeit all due process rights if he was not accepted for the review or reinstatement. Fields responded to the Department that he wanted to be reinstated but could not agree with the terms as set forth because they were retaliatory and humiliating. Fields reminded the Department of an agreement that the Department negotiated with him in "bad faith" in February 1991 in which he was contacted by the Department and offered reinstatement if he reinactivated his administrative claims for resolution. They agreed that he would be reinstated in 90 days. However, once the claims were activated the Department reneged on the agreement, then harassed, and retaliated against him so badly that the Equal Employment Opportunity Commission (EEOC) threatened to refer his administrative claims to the Office of Special

Counsel. Fields informed the Department that he could not trust their offer and the matter ended.

The Department appealed the opt out portion of the decision on the basis that the Judge had abused his discretion in allowing class members to opt out of the settlement. Class plaintiffs cross-appealed the settlement and the opt out.

On July 15, 1997, the Court held a Status Hearing. The court ruled that the individuals who had opted out of the class settlement could proceed with their individual cases. Fields reported to the Court the penalties that the Department had placed on him for reinstatement. The Judge told him that was not what he intended and told him to write to the Secretary of State with a copy of the transcript with the Judge's instructions to review Fields for reinstatement. The letter was sent and follow-up calls were made, but the Department did not respond. Fields also reported to the Court that he had just received an investigative report on a complaint of harassment and retaliation filed in 1995 on the mishandling of his administrative complaints filed in the 1980's. The report disclosed that the Department's Legal Counsel had deliberately delayed investigating his complaint for nearly two years from 1995-1997 and tagged him as "Fields Forever". The attorneys were the same government officials involved in the settlement negotiations in which Fields' name was removed from the reinstatement list. Fields, again requested that the Court appoint an attorney to represent him because of his dire financial status. Fields reported to the Court that he had been blackballed by the Department and could not find

employment anywhere at any level, and that he had been pursuing this case for 15 years through the administrative process. The Court granted his request but because of fast moving events and deadlines, he could not find anyone.

Fields discovered in late 1997, that as the Department had taken a "position" that he would have to take a demotion to the junior officer ranks with losses of back pay and benefits for reinstatement, the Department, while defending itself in another lawsuit in late 1997, disclosed that it had reinstated at least 1 white male and recruited 11 other white male persons through its Affirmative Action Mid Level Foreign Service Officer Program, which was in theory, practice and application restricted to the hiring of minorities and females. Since the Department admits that there were other mid level programs, then it would appear to be an effort to undermine the rehiring of the plaintiffs on the reinstatement list which was also – 12. The Department had also represented to the Court during the Fairness Hearing that the reason that Fields was not eligible for reinstatement was because his grade was too high, meaning mid level status. Would this not appear to be additional evidence that the Department has continued to discriminate and retaliate against Fields in the middle of settling the lawsuit? Would this also mean that the class settlement has done little to deter "wrong doing" in the Department? On the one hand, the Department negotiated a settlement and consent decree to deny reinstatement and other rights and entitlements to Fields, but had given special rights to other individuals. The Department's actions appear to be in violation of Title VII of the Civil

Rights Act of 1964, as amended, and the spirit and the letter of the Consent Decree. The Fairness of this settlement and Consent Decree should be held to the highest level of scrutiny due to the high stakes involved in eradicating racial discrimination in the federal government pursuant to the U.S. Constitution and the denial of due process and Fields should be allowed to proceed with his separate case where he will win or lose based on the merits. "The sole question before the District Court in reviewing a settlement agreement is whether the agreement is fundamentally fair and just". *Moore v. City of San Jose,* 615 F.2d 1265 (9th Cir. 1980). " . . . it is desirable that any dissatisfied member of the class be permitted to get out if they wish". *Grogan v. American Brands, Inc.,* 70 FRD 579 584 (MDNC 1976) " . . . a Federal Court, no less – itself being the instrument of racial discrimination . . . "

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to reconcile a conflict between the circuits on the important issue of whether opting out of a Rule 23 class action settlement is a proper remedy when a class member would otherwise be denied his individual right to due process?

A. Factual Background

The Department has shamefully forced the petitioner as well as many others into a most difficult position in their lives in which long existing discrimination policies and practices are being brought to the U.S. Supreme

Court for Justice. The epitome of the Department's arrogance in dealing with problems of racial discrimination is how lawyers at the Department from the Legal Ethics and Personnel Section, who are officers of the Court deliberately held up the investigation of Fields' complaint, rejected his request for reinstatement during an informal settlement conference of his complaint, participated in the removal of his name from the class action during settlement talks and tagged him as "Fields Forever" as they "jokingly" denied him his constitutional rights.

The Foreign Service Act of 1946, as amended addressed the subject of the lack of opportunities for minorities and women by enacting a Lateral Entry Program for them to enter the Foreign Service at the middle ranks so that they could rapidly rise to high level positions of authority and responsibility to be a model for the world that the Foreign Service was indeed representative of the American population. Following that then, Secretary of State Dean Rusk brought in minority and women's groups from around the country for a meeting in Washington soliciting their assistance to help him to resolve the problems that he faced at that time. Although, the Lateral Entry Program was implemented, it was not for minorities and women. A similar controversial program was eventually put into place in the mid 1970's and it was the Affirmative Action Mid Level Foreign Service Officer Program for minorities and women. Here it is fifty years later, and the same problems exist, someone, Fields, is seeking justice involving the denial of opportunity to work and represent his country because of old held attitudes and practices of racial bias. Such as covertly bringing in 12 white males into the Affirmative Action Mid

Level Program that seemed to be an effort to match the 12 people on the reinstatement list of the class action case. Then tell Fields that he could not even be considered unless he re-entered the service as a demoted junior officer level. The Affirmative Action Program that Fields had entered the service was being used to enhance opportunities and careers of white males to the continuous detriment of women and minorities. There are essentially three ways to confront and resolve the important right of obstruction of employment and denial of fairness and due process; (1) permit him to proceed with his individual case where he will win or lose based on the merits of the case; (2) remand the case back to the District Court for review of the violation of the Consent Decree; or (3) decertify the Consent Decree. "The Court remanded the action to determine . . . whether the early closing of the settlement sacrificed any interests of the named plaintiff". *Ficalora v. Lockheed Cal Co.*, 751 F.2d 995 (9th Cir. 1985); *Hammon v. Barry*, 752 F. Supp. 1087 (DDC 1990). "One indication of the fairness of a class settlement is the lack of or small number of objections (citing Newberg on Class Actions 2d ed. 1985).

Citing Mass Tort Settlement Class Actions, Federal Judicial Center, 1998; "Lawyers in our legal system are required to act with a high degree of loyalty to their clients' interests and to avoid conflicts of interest". P.42 Not only were Fields' rights not protected, during settlement but Fields also found it strange that the Director General of the Foreign Service, George Vest who was

involved in the decision to deny assignments and postings, promotions, tenure, awards and unlawfully terminate class members due to racial discrimination retired from the Department and directly went to work for Akin, Gump, Strauss, Hauer and Feld, one of Fields' and other members legal representative. Fields discussed this matter with his counsel and was told that there was no conflict because he worked in another section.

The Court of Appeals has agreed with the Department that a court cannot modify a settlement. Counsel for the Department, John Birch was quite adamant about this point with Petitioner's counsel concurring, however, in *Bowling v. Pfizer Inc.*, 143 F.R.D. "Since judges cannot usually [with emphasis added] modify the terms of a class settlement . . . " see Mass Tort Settlement Class Actions, Federal Judicial Center 1998. In *Patterson v. Newspaper & Mail Deliveries' Union*, 384 F. Supp. 585 (SDNY 1974), *affd.*, 10 FEP Cas (BNS) 349 (2d Cir. Mar. 20, 1975) . . . "this is not an ordinary case. It must be recognized that efforts to correct discrimination affect the strongest public sensitivities. The interests involved are far broader than those of the particular parties in a particular lawsuit. Therefore, the parties cannot be permitted to settle for less than, or for more than, the facts of the case and public policy expressed in Title VII mandate. *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) "Parties to a proposed class action settlement may exclude themselves from the class and litigate their claims in the same action or in a separate lawsuit, . . . and in appropriate cases a court may conclude that a proposed settlement should be disapproved unless the parties agree to seek a procedure".

"In a Title VII employment class action, the court approved certain modifications in a Consent Decree that had been agreed upon by the parties." *Alaniz v. California Processors, Inc.*, 73 FRD 269 (ND Cal.), *modified*, 73 FRD 298 (ND Cal. 1976), *affd.*, 572 F.2d 657 (9th Cir. 1978). The record of this case clearly shows that despite the Department's continuous actions of impeding investigations, employment interference, harassment and retaliation, Fields has wholly met the criteria which was established in *Amchem v. Windsor, Eubanks v. Billington* and the intended purposes of Rule 23 and that he should not be further denied his individual due process rights.

B. Certiorari Should Be Granted To Resolve The Split of Authority Among The Circuit Courts Of Appeal

It would appear that the Appeals Court may have overlooked the statement in the brief filed on the Plaintiff's cross appeal and appeal p. 6 "Odie Fields. . . . testified that he had been subjected to retaliation" and that he was essentially forced out of the settlement due to counsel taking over the case. The Appeals Court decision is inconsistent with an earlier ruling that it made in *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997). "The court noted that the availability of opt-out rights in (b)(1) and (b)(2) class actions was an unsettled question in the circuit . . . The rigidity of this position has not escaped criticism . . . permitting opt out in (b)(1) and (b)(2) actions are few, a number of circuits recognize that district courts have discretion to permit them. The court joined those circuits holding that language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt out

rights (b)(1) and (b)(2) class actions." The decision in *Thomas v. Albright* is also inconsistent with: *cf. Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1997). *Ostapowitz v. Johnson Bronze Co.*, 54 FRD 465 (W.D. Pa. 1972) (Rule 23(b)(2) and (b)(3) (sex). Rule 23(c)(2) notice was recovered in a Rule 23(b)(3) action . . . the court's discretion Rule 23(d)(2) notice was necessary to satisfy due process and give members of certain subclasses an opportunity to opt out; *Walker v. Styrex* includes, 21 Fed. R. Serv. 2d (Callahan) 335, 358 (MDNC Jan. 7, 1976) (race); *Penson v. Terminal Transp. Co.*, 634 F.2d 989 (5th Cir. 1981); *Greenspan v. Automobile Club*, 34 Fed. R. Serv. 2d (Callahan) 793 (E.D. Mich. Dec. 8, 1981) (sex); *Women's Comm. for Equal Employment Opportunity v. NBC*, 71 FRD 666, 671 (SDNX 1976); *cf. Fuller v. Fruehauf Trailer Corp.*, 168 FRD 588 (E.D. Mich. 1996) (ERISA); *Phillips Petroleum Co. v. Sheetts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Witzel v. Liberty Mut Ins Co.*, 508 F.2d 239, 255-57 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Amchem Products, Inc. v. Windsor* 117 S. Ct. 2231 (1997). Citing Newberg on Class Action Vol. 1, 8, 1.19, 1-47 "no express opt-out right is granted or prohibited under Rule 23 for a class certified under 23(b)(1) or (2)."

It cannot be anticipated that Rule 23(b)(2) which was designed for the purpose of "eradicating segregation," an idea and motive that the majority in this or any society would support, but the government of the United States is finding itself involved in some old notions and practices that are denying an African American his natural right to life, liberty, happiness, property and the right to serve his country at the highest level. Therefore, justice in this case demands a clarification of the rules and an

opportunity for the petitioner to go forward to prosecute his case.

The mass tort settlement class actions are in search of perfection and cannot compare with rights of constitutional due process, therefore class members' right to opt out of a flawed settlement agreement and proceed with his claim should not be extinguished. *See County of Suffolk v. Long Island Lightning Co.*, 907 F.2d 1295 (2nd Cir. 1990). Moreover, although no opt out right is provided for mandatory class actions, a constitutional right to opt out of at least some mandatory class actions may exist. The Supreme Court has twice granted certiorari to consider the issue but has thus far not resolved it. *See Ticor Title Inc. Co. v. Brown*, 511 U.S. 117 (1994); *Adams v. Robertson*, ___ U.S. ___, 117 S. Ct. 1028 (1997). *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Citing Newberg on Class Actions Vol. I 1-54, "The Supreme Court recently recognized in *Martin v. Wilks* that due process is satisfied after Shutts by a no opt out class action in appropriate circumstances". Citing Newberg on Class Actions Vol. I 1-47, "No express opt out right is granted or prohibited under Rule 23 for a class certified under 23(b)(1) or (b)(2)".

For a number of years a split has existed between the Courts of Appeal over whether opting out of a Rule 23 class action settlement is a proper remedy when in cases such as this one, a class member would otherwise be denied his individual right to due process? This court's review is most certainly warranted.

CONCLUSION

For the forgoing reasons, the instant Petition for a Writ of Certiorari should be granted.

Dated: August 25, 1998

Respectfully submitted,
ODIE N. FIELDS
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In Proper Person

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 13, 1997 Decided March 27, 1998

No. 97-5004

WALTER J. THOMAS, ET AL.,
APPELLEES/CROSS-APPELLANTS,

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE,
APPELLANT/CROSS-APPELLEE.

Consolidated with
97-5018

Appeals from the United States District Court
for the District of Columbia
(No. 86cv02850)

Cynthia A. Schnedar, Assistant U.S. Attorney, argued the cause for appellant/cross-appellee, with whom Mary *Lou Leary*, U.S. Attorney at the time the briefs were filed, *John D. Bates*, *R. Craig Lawrence*, and *John Oliver Birch*, Assistant U.S. Attorneys, were on the briefs.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Barbara B. Hutchinson argued the cause for appellees/cross-appellants Walter J. Thomas, et al., with whom *Theresa L. Watson*, was on the briefs.

Avis E. Buchanan, argued the cause for amicus curiae plaintiff class, with whom *Warren E. Connelly, Charles L. Warren, Richard P. Schlegel*, and *Joseph M. Sellers* were on the briefs.

Before: EDWARDS, *Chief Judge*, GINSBURG, *Circuit Judge*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge:* This is a Title VII class action in which the plaintiffs allege that the United States Department of State discriminated against African-American Foreign Service Officers. The Department and a group of nine class members separately appeal from the district court's approval of the class settlement. The Department appeals the district court's decision to permit class members to opt out of the class settlement. The nine cross-appellants challenge the district court's approval of the consent decree as fair and reasonable. We affirm the district court's decision that the consent decree is fair and reasonable, but reverse its decision allowing opt-outs.

I. Background

In 1984 Walter J. Thomas, a former Foreign Service Officer, filed an administrative complaint on behalf of himself and other African-American FSOs, alleging racial discrimination in the Department's employment practices. In 1986, after the Department had rejected Thomas' complaint, he and another former FSO filed a class action

complaint in district court alleging that the Department engaged in racially discriminatory employment practices and retaliated against those who complained about them. *Thomas v. Christopher*, 169 F.R.D. 224, 229 (D.D.C.1996).

The plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b)(2). The court denied their motion but permitted the plaintiffs to file an amended complaint adding several more plaintiffs. The parties conducted discovery for six years and, beginning in 1993, engaged in settlement negotiations, eventually under the supervision of a magistrate judge. In 1994 the plaintiffs filed another motion for class certification, in which they contended that although their class could be certified pursuant to Rule 23(b)(3), "it is more appropriately maintained as a Rule 23(b)(2) class action." The court deferred ruling upon this motion pending the outcome of the settlement negotiations.

In 1995 the parties reached a settlement in principle, and in January 1996 they signed a consent decree. The consent decree "resolves all claims that were or could have been brought" by African-American FSOs between 1984 and 1996 based upon racial discrimination in promotions, awards, tenuring, termination, performance reviews, assignments, and training, or upon retaliation for complaining about such discrimination. The parties agreed that the court would certify the class pursuant to Rule 23(b)(2).

The consent decree provided for the following relief:

(1) Monetary Relief – The Department agreed to pay a total of $3.8 million, to be allocated as follows: (a) $125,000 for the named plaintiffs ($40,000 to Thomas for "his leadership and coordinating role" and $85,000 divided equally among the 29 other named plaintiffs); (b) $2.9 million for those who experienced delays in and denials of promotions, to be allocated upon the basis of a formula specified in the consent decree, but not to class members who would receive a promotion under the consent decree or who had been promoted at the same rate as white employees; and (c) $775,000 for class members who had been terminated, of which at least $200,000 was to be distributed formulaically to those who were either terminated for unsatisfactory performance or constructively discharged, and up to $575,000 of which was reserved for a maximum of four recipients to be chosen upon the basis of, among other things, the severity of the discrimination and the degree of economic hardship they had suffered.

(2) Promotions – The Department agreed to give retroactive promotions to the 16 mid-level class members and to the one senior-level class member who had been at their current grade-levels for the longest time and had been recommended previously for promotion.

(3) Reinstatement – The Department agreed to offer a new five-year appointment to each of four class members who had been fired when they failed to get tenure within the required time.

(4) Injunctive and Prospective Relief – The Department agreed to: (a) submit to an injunction against its discriminating on the basis of race or retaliating for equal

employment opportunity activities; (b) create a Council for Equality in the Workplace to monitor the EEO activities of the Department; (c) modify its employee evaluation reports and engage a consultant to help determine whether further revisions are necessary; (d) revise and expand its diversity and EEO training; (e) establish a working group to monitor the grant of awards to employees; (f) use its best efforts to include an African-American on any board considering an African-American for termination; (g) continue development of an electronic personnel database to monitor employment actions; (h) report employment and EEO information to class counsel for four years; and (i) adopt an affirmative action plan approved by the Equal Employment Opportunity Commission.

(5) Attorneys' Fees – The Department agreed to pay $2.1 million in attorneys' fees, plus an additional amount for any services rendered after the district court's preliminary approval of the consent decree.

Class counsel and the Department also entered into a letter agreement providing that (1) the consent decree would not address the issue of opt-outs; and (2) class counsel would (a) support the settlement in court as "fair and reasonable to the class as a whole"; (b) not take a legal position regarding opt-outs other than to advise the court that it "may have the discretion to allow opt outs"; and (c) not advocate that class members opt out.

In March the district court held a two-day hearing and preliminarily approved the consent decree. The court then ordered that the consent decree and notice of the fairness hearing be sent to all known class members. 169

F.R.D. at 231. The notice advised class members that the court might grant them the right to opt out. Of 359 class members, 34 wrote the court in support of the consent decree and 55 wrote in opposition. *Id.* at 235.

In June class members were informed of their individual awards under the consent decree. The Department, as agreed, retroactively promoted 17 class members and reinstated four. It awarded an average of $10,900 in promotion damages to 265 class members. Twenty-nine class members received an average termination award of $16,400, and the four class members who had incurred the greatest injuries received an average termination award of $75,000. *Id.* at 234-35.

At the fairness hearing later that month 14 class members testified; three supported the consent decree, eight opposed it, and three were "ambivalent or neutral." *Id.* at 235. The court required the Department to send notices to opponents of the agreement informing them that if they wished to opt out then they had to file a motion stating "the reasons for this request, and any law" supporting it. Of the nineteen class members who filed motions to opt out all but nine chose ultimately to remain in the class.

The court certified the class under Rule 23(b)(2) and approved the consent decree pursuant to Rule 23(e). The court found that the settlement was "negotiated at arm's length and presents no danger of collusion"; it then held that the consent decree was fair and reasonable in light of the disputed evidence and the risks of litigation. Nonetheless, the court allowed those class members so desiring to opt out of the consent decree. *Id.* at 239-44.

II. Analysis

The Department of State appeals the district court's decision permitting opt-outs, while the cross-appellants, nine members of the plaintiff class, object to the court's approval of the consent decree. Class counsel submitted a brief in support of the consent decree but did not take a position concerning the dissidents' right to opt out.

A. Fairness of the Consent Decree

Rule 23(e) states that "[a] class action shall not be dismissed or compromised without the approval of the court." Before it can approve a settlement a district court "must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987). The court's primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case. *See, e.g., Isby*, 75 F.3d at 1199. The court should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial. *See EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); *see also United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977).

The dissident members of the class in this case contend that for a host of reasons the district court abused its discretion in approving the consent decree as fair. We

conclude, to the contrary, that the settlement is eminently fair and reasonable to the class as a whole.

First, with respect to the class-wide relief the dissidents complain that the consent decree does not (1) alter the Department's allegedly discriminatory assignment system, (2) give any "relief for retaliatory acts taken by the Department," or (3) provide for the expungement of employee records infected with discrimination. In making the first two charges the dissidents seem oblivious to the significant monetary, reinstatement, and promotional relief awarded to class members who claim the Department discriminated or retaliated against them. Moreover, the injunction prohibits discrimination in general and in assignments in particular, forbids retaliation, and prescribes monitoring procedures so that class counsel can ensure the Department complies. Together these provisions of the consent decree both redress past and deter future discrimination in assignments and inhibit future retaliation. Finally, although the consent decree does not provide for expungement of employee records potentially tainted by discrimination, it does require revisions to the employee evaluation reporting form in order to help prevent racial discrimination in the future.

Second, the dissidents argue that the consent decree is inadequate with respect to the compromise of claims regarding discrimination in promotions. While the district court found no statistically significant evidence of such discrimination in the junior and senior grades, the plaintiffs did present statistical evidence suggesting that there had been between 40 and 47 fewer promotions, primarily in the mid-level grades, than there would have been but for discrimination. The Department presented

its own statistical evidence suggesting that the shortfall was at most 10 promotions. The district court reasonably determined that in view of the conflicting evidence, the compromise calling for 17 promotions was fair and reasonable. Moreover, those who were not awarded a promotion received monetary compensation for delays in and denials of promotions.

Relatedly, the court did not abuse its discretion in approving the provision of the consent decree calling for only one promotion to be made in the senior grades; there was no statistically significant evidence of any shortfall of promotions in those grades. Nor did the district court abuse its discretion when it concluded that the consent decree was fair in awarding retroactive promotions only to those active FSOs who had been at their current grade the longest and who had been recommended for but not granted a promotion. To determine which individual class members would have been promoted but for discrimination would have been difficult for all concerned, wherefore we cannot say that the quick and dirty alternative upon which the parties settled was unreasonable. We reject also the dissidents' contention that it was unfair not to provide any monetary award to those who received a promotion. A settlement necessitates compromise, and the agreement that some individuals would get a promotion while others would get cash is not an unreasonable way to allocate two scarce resources.

Third, the dissidents contend that the consent decree is insufficient regarding reinstatement. They argue that (1) four reinstatements was too few; (2) the reinstatements went only to employees who were terminated when they failed to get tenure and not to tenured

employees who were terminated for allegedly poor performance; and (3) those who were reinstated should have received tenured positions rather than returning as untenured employees. The parties presented conflicting evidence regarding whether there was a statistically significant excess in the number of African-American employees terminated. The Department's expert argued that employees terminated when they did not get tenure should be treated separately from tenured employees fired for performance-related reasons because the two types of adverse decisions are unrelated. Nonetheless, the Department's expert opined that terminations of neither tenured nor untenured African-American employees were significantly above the norm.

We conclude that the district court properly held both that four was a reasonable number of reinstatements and that the agreement limiting reinstatement to those who were terminated for failing to reach tenure was fair in light of the parties' competing statistical analyses and the risks attendant to litigation. Further, although the number of reinstatements was limited to four, 29 of the 30 employees who applied for termination damages received a monetary award. Again, the dissidents have not shown that this division of the settlement proceeds is unreasonable considering the interests of the class as a whole. As for the reinstatements being without tenure, none of the dissidents appears to be among those reinstated; therefore, the dissidents do not have standing to pursue this particular objection to the class settlement. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1181 (5th Cir. 1978) ("[A]ppellants who were excluded from the subclass and denied back pay lack standing to

contest the adequacy of the awards received by other class members").

Fourth, the dissidents appear to complain that they did not receive sufficient monetary relief. We conclude, however, that the district court did not abuse its discretion in approving as fair, adequate, and reasonable the amount of the damages provided in the consent decree. Class counsel estimated the Department's overall exposure to liability at from $2.5 million to $4 million while the Department put the figure at from $725,000 to $1.5 million; each side had reasonable arguments for its position. Based upon the conflicting evidence and arguments, the risks of litigation, and the time value of money, the district court reasonably determined that the $3.8 million upon which the parties had settled was "at the high end" of what the class could have expected after trial. The dissidents complain that the settlement "unfairly limited monetary relief for egregious acts of discrimination to four persons." The dissidents provide no reason why it was unfair to award an average of $75,000 in damages to the four most significantly injured of the terminated class members. A claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; as we indicated above, a settlement necessitates compromise.

Fifth, the dissidents argue that it was improper for the court to approve the settlement over the objections of a large number of class members, including several of the named plaintiffs. But a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *See Grant*, 823 F.2d at 23; *Hiram Walker*, 768 F.2d at 891-92; *Cotton*, 559 F.2d at 1331; *Flinn v.*

FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975); *cf. Pettway*, 576 F.2d at 1215-17 (acknowledging general rule but holding settlement unfair where approximately 70% of class and all named plaintiffs objected). Here only 15% of the class members objected; 85% accepted the settlement, and many of them actively supported it. The district court did not abuse its discretion, therefore, in approving the settlement in spite of some opposition.

The dissidents cite *Ficalora v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), and *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976), for the proposition that it is an abuse of discretion for a district court to approve a settlement over the objection of the named class members. The teaching of those cases, however, is that the district court must consider the objections raised by the named plaintiffs. *Ficalora*, 751 F.2d at 997; *Mandujano*, 541 F.2d at 836-37. In *Mandujano* the court also said that the opposition of a significant number of named plaintiffs "is a factor to be considered when approving a settlement." 541 F.2d at 837. Here the district court conducted hearings and permitted all interested parties, including the dissidents, to testify. The court considered the objections of the plaintiffs but pointed out that "the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled." 169 F.R.D. at 243. The district court's decision is therefore consistent with the Ninth Circuit cases cited.

Finally, the dissidents argue that class counsel did not act in the interest of the class when counsel agreed to

argue that the consent decree was fair and not to advocate the right to opt out, and agreed to the provision of the consent decree stating that the court may not modify the agreement. In our view counsel more than adequately represented the class as a whole. The letter agreement to which the dissidents point was part of a global compromise between the parties, who had negotiated their settlement only after significant discovery and under the supervision of a magistrate judge. In view of the complexity and fragility of such a compromise, the provision prohibiting the court from modifying the terms of the agreement is understandable as being in the interests of both parties; it is not indicative that class counsel acted in any way at the expense of the class.

In sum, the dissidents complain about particular portions of the overall settlement and claim that they are individually entitled to more. It is the obligation of the district court, however, to evaluate the fairness of the settlement to the class as a whole. We conclude that the district court did not abuse its discretion in approving the consent decree as fair, adequate, and reasonable to the class as a whole.

B. Opting Out

The Department argues that our recent decision in *Eubanks v. Billington*, 110 F.3d 87 (D.C.Cir. 1997), holding that a court may permit members of a class certified under Rule 23(b)(2) to opt out of the class action and thus retain the right to sue on their own, is invalid after the still more recent decision of the *Supreme Court in Amchem*

Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997). Alternatively, the Department contends that under the criteria of *Eubanks* the district court abused its discretion in permitting the dissidents to opt out. We conclude that *Amchem* does not affect our holding in *Eubanks*, but we agree with the Department that under *Eubanks* the district court abused its discretion in permitting the dissidents to opt out.

Rule 23(a) establishes four prerequisites for certifying a lawsuit as a class action. They are that

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides for three types of class actions. Subsection (b)(1) allows a class action if separate actions would risk inconsistent adjudications or if individual adjudications would "be dispositive of the interests of the other members not parties . . . or substantially impair or impede their ability to protect their interests." Under subsection (b)(2) a class action may be maintained where

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Finally, a subsection (b)(3) class action is appropriate where

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The requirements of predominance and superiority in subsection (b)(3) are, of course, additional to the requirements of subsection (a), which applies to all class actions. The right to opt out of a subsection (b)(3) class action is expressly provided in Rule 23(c)(2).

In *Amchem* the Supreme Court addressed the procedure for approving a class action settlement. In that case the parties had simultaneously filed a class action complaint, an answer thereto, and a settlement agreement. The district court certified the class action under Rule 23(b)(3) and approved the settlement. The Third Circuit reversed, holding that the district court should have evaluated whether to certify the class just as it would have done if the action were going to be tried. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 624-26 (1996).

The Supreme Court affirmed the judgment of the court of appeals although it clarified that "settlement is relevant to a class certification" in that, if the case is surely going to be settled, then the "district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997). A "settlement-only class certification" does, however, depend upon compliance with all the requirements of Rule 23(a) and (b). The Court made clear that a district court is to adhere closely to the rule:

> [O]f overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce.
>
> * * *
>
> Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is "fair," then certification is proper.

Id. at 2248, 2249.

The Department contends that this court's recent decision in *Eubanks* was effectively overruled by the Supreme Court's direction in *Amchem* that courts are bound to observe strictly the requirements of Rule 23. *Eubanks* was a Title VII class action brought against the Librarian of Congress and certified under subsection (b)(2). The district court approved the parties' settlement and held that even if there were a right to opt out of a subsection (b)(2) class action, the individual plaintiffs had failed to show that they were entitled to opt out. Upon appeal we held that, although the district court may in certain circumstances permit members of the plaintiff class to opt out of a (b)(2) suit, the court in that case had not abused its discretion in declining to do so. We recognized that Rule 23 does not "address the possible need for opt-out rights in non-(b)(3) actions," but we thought the Rule "sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions" in certain circumstances. *Eubanks*, 110 F.3d at 93, 94. We based that ruling upon Rule 23(d)(5), which specifically authorizes the court to make "appropriate orders" to govern "procedural matters" in a class action; subsection (d)(5) is broad enough, we held, to permit the district

court to provide for opt-outs when appropriate in (b)(1) and (b)(2) class actions. *See id.* at 96; *see also* FED. R. CIV. P. 23(d) advisory committee's note (1966) (stating that subsection (d) "is concerned with the fair and efficient conduct of the action").

We went on to say that the district court may, when necessary to the fair and efficient conduct of the litigation, exercise its discretion to allow opt-outs in at least two ways. First, if the court finds that "the assumption of cohesiveness" underlying certification of a (b)(2) class is inapplicable to the individual class members' claims for monetary damages, then it may certify a hybrid class action under subsections (b)(2) and (b)(3) – the latter of which contemplates individual damages determinations. *Eubanks*, 110 F.3d at 96. Second, if the court determines that particular plaintiffs' claims are "unique or sufficiently distinct from the claims of the class as a whole," as, for example, where a member of the plaintiff class had filed his own civil action before the class action was filed, *see, e.g., County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304-05 (2d Cir. 1990), then it may permit opt-outs "on a selective basis." *Eubanks*, 110 F.3d at 96.

Nothing in the interpretation of Rule 23 we advanced in *Eubanks* is inconsistent with the Supreme Court's subsequent decision in *Amchem*. The district court's error in *Amchem* had been in substituting the fairness inquiry of Rule 23(e) for the certification requirements of Rule 23(a) and (b). In *Eubanks* we did not omit or even relax any requirement of Rule 23; rather, we held only that in

certain limited circumstances the district court has discretion under subsection (d)(5) to permit opt-outs, notwithstanding the absence of a specific authorization in subsection (b)(2).

In the alternative the Department argues that the district court abused its discretion by permitting opt-outs because it did not follow either of the options for doing so outlined in *Eubanks*. When the district court issued the decision now before us, *Eubanks* had not yet been decided. Relying instead upon *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the district court asserted that allowing opt-outs is appropriate "when the monetary relief stage . . . is functionally more similar to a (b)(3) class than to a (b)(2) class." 169 F.R.D. at 244. The court was "impressed with the vehemence with which some members of the class have opposed the settlement" and noted its "concern" that "in the absence of allowing for 'opting out' some searing individual injury might be greatly under compensated." *Id.* at 245.

We agree that the district court abused its discretion when it allowed class members to opt out of the settlement in this case. The district court did not pursue either of the two options we later approved in *Eubanks*, nor did it adduce any other tenable ground upon which opting out might be permitted. Indeed, the dissident plaintiffs do not argue that their case fits within either of the two circumstances instanced in *Eubanks*, nor do they suggest any alternative basis upon which we can uphold the decision of the district court.

First, the district court clearly did not certify a hybrid class action based upon a finding that "the assumption of

cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages." *Eubanks*, 110 F.3d at 96. Class counsel repeatedly requested certification pursuant to (b)(2), the consent decree stated that the parties agreed to certification pursuant to (b)(2), and the court ultimately certified the class pursuant to (b)(2). Although the district court in allowing opt-outs did refer to the distinction between a (b)(2) and a (b)(3) class action, the court did not purport to hold, and did not make findings sufficient to support the conclusion, that a hybrid class certification was appropriate: The court found neither that the assumption of cohesiveness underlying a (b)(2) class certification was unjustified with respect to plaintiffs' individual claims for monetary damages, nor that the monetary or other individual claims were appropriate for certification under (b)(3). Nor did the district court address the predominance and superiority requirements for certification under (b)(3). To the contrary, the court made all the factual findings necessary to show that a hybrid class was not appropriate. The court determined that the plaintiffs sought "extensive injunctive and systemic relief in addition to monetary damages," 169 F.R.D. at 239, and found that the plaintiffs' "predominantly equitable claims . . . arose from a system of personnel actions that have been uniformly imposed on all class members," *id.* at 238.

We recognized in *Eubanks* that whenever individual plaintiffs in a subsection (b)(2) class have claims for different amounts of damages, their interests may begin to diverge. 110 F.3d at 95. As noted above, however, before hybrid certification is appropriate there must be some

reason to believe that the assumption of cohesiveness underlying a subsection (b)(2) class action does not apply to the individual claims for monetary damages; for example, the amounts claimed by various class members may be so disparate as to create a conflict of interest within the class. Here the district court did not find that the assumption of cohesiveness had broken down; nor do the dissident plaintiffs so argue before this court.

Second, the district court did not find that the claims of the individual dissidents are so atypical of the claims of the class as to justify permitting them to opt out of the class. The court stated that there might be some class member(s) with a "searing individual injury" who would be "under compensated" if limited to the relief provided in the consent decree. The court did not determine, however, that there are in fact such persons in the class, let alone that the dissidents are among them. The dissidents do not even argue that they have suffered an unusually grave degree of injury; rather, they argue merely that they stand to be undercompensated for their injuries. As we made clear in *Eubanks*, however, that is not a sufficient justification for permitting members of the class to opt out:

> That . . . appellants received less under the settlement agreement than they might have expected to receive had they prevailed in individual lawsuits cannot alone justify an opt-out, as no party can reasonably expect to receive in a settlement precisely what it would receive if it prevailed on the merits.

Id. at 98. Moreover, this argument was more properly directed to the issue of fairness, *id.* at 98-99, and as such it

was rejected both by the district court in the fairness hearing and by this court (in Part II.A, above). Nor are the dissidents' claims different in kind from those of other class members: In certifying the class the court specifically found that the claims of the named plaintiffs, including eight of the nine cross-appellants, were "typical" of the claims of the class as a whole. 169 F.R.D. at 238.

Third, although the district court could properly rely upon *Holmes* before we issued *Eubanks*, it erred in its application of that case and thereby abused its discretion. *See Koon v. United States*, 116 S. Ct. 2035, 2047 (1996) ("A district court by definition abuses its discretion when it makes an error of law"). In *Holmes* the court held that "[t]he presence in the lawsuit of a significant number of atypical claims not common to the class" required the district court to permit opt-outs. 706 F.2d at 1155. The court also suggested that the assumption of cohesiveness in Rule 23(b)(2) claims for injunctive relief may break down when there are individual claims for disparate amounts of monetary damages and that in such cases opt-outs may be required. *Id.* at 1159-60. As we have pointed out, however, here the district court did not find (and the dissidents do not contend) that the dissidents' claims are atypical or that the assumption of class cohesiveness has broken down.

The dissidents argue, at least implicitly, that they should be permitted to opt out because several of them had individual discrimination complaints pending against the Department. In *Eubanks*, however, we rejected the contention that a pending administrative complaint – as opposed to a lawsuit filed in court – is sufficient to

support a class member's preference to opt out of a class action. *See* 110 F.3d at 97. One may not, by first filing an administrative charge and then affirmatively joining a class action as a named plaintiff or an intervenor, obtain the option to see whether the result in the class suit is satisfactory and, if not, then to take up the administrative charge again.

The dissidents also argue, as they emphasized at oral argument, that they must be permitted to opt out because they object to the settlement of their individual claims (as opposed to the class claims). This is not the law; otherwise members of the plaintiff class would have to be allowed to opt out whenever there are individual claims for monetary damages in addition to class claims for injunctive relief. *Eubanks* itself involved claims for injunctive as well as monetary relief, however, and we upheld the district court's decision not to permit opt-outs. Insofar as the dissidents mean to suggest that their individual claims for monetary damages are somehow unique or atypical, as noted above they give us no reason to accept that conclusion.

We hold, therefore, that the district court abused its discretion in permitting the dissident class members to opt out of this class action; the district court made no findings that would support opting out under *Eubanks*. Nor is it necessary to remand the case for the district court to make further findings in light of *Eubanks*; the Department argued in its brief that a remand was not necessary, and the dissidents did not seek a remand to develop the record further in the event we determined that *Eubanks* was not satisfied. Moreover, the dissidents do not allege any alternative basis that, if proved, would

enable the district court upon remand again to permit them to opt out.

III. Conclusion

For the reasons stated above, we hold that the district court did not abuse its discretion in approving the fairness of the consent decree. We also conclude that *Amchem* does not undermine this court's holding in *Eubanks*, and that the district court abused its discretion in permitting some members of the class to opt out of the settlement of this case. Accordingly, we uphold the district court's approval of the consent decree and direct that it be made binding upon all members of the class.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5004 **September Term, 1997**

Walter J. Thomas, et al.,

Appellees/Cross-Appellants

v.

Madeleine K. Albright,
Secretary of State,

Appellant/Cross-Appellee

Consolidated with 97-5018

Appeals from the United States District Court
for the District of Columbia
(No. 86cv02850)
(Filed Mar. 27, 1998)

Before: EDWARDS *Chief Judge*, GINSBURG, *Circuit Judge* and BUCKLEY, *Senior Circuit Judge*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in

accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: March 27, 1998

Opinion for the Court filed by Circuit Judge Ginsburg.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5004 **September Term, 1997**
86cv02850

Walter J. Thomas, et al.,
Appellees

Bernard Johns, et al.,
Amicus

v.

Madeleine K. Albright, Secretary of State,
Appellant

Consolidated with 97-5018

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed May 27, 1998)

Upon consideration of the Suggestion for Rehearing *In Banc* of appellees/cross-appellants, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5004 **September Term, 1997**
86cv02850

Walter J. Thomas, et al.,
Appellees

Bernard Johns, et al.,
Amicus

v.

Madeleine K. Albright, Secretary of State,
Appellant

Consolidated with 97-5018

BEFORE: Edwards, Chief Judge, Ginsburg, Circuit Judge, and Buckley, Senior Circuit Judge

ORDER

(Filed May 27, 1998)

Upon consideration of the petition for rehearing of appellees/cross-appellants filed May 12, 1998, it is

ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*, Plaintiff, v. WARREN CHRISTOPHER Secretary of State, Defendant.	Civil Action No. 86-02850 (Judge Stanley Sporkin)

ORDER

(Filed Nov. 7, 1996)

Plaintiffs' case was originally brought in October 1986. On January 31, 1996, counsel for the plaintiff class agreed to recommend a settlement to the approximately 360 putative class members. The terms of the settlement are embodied in a Consent Decree, which was signed by the parties on January 31, 1996, and then submitted to the Court for its approval. The Court held a preliminary hearing on the Consent Decree on March 13, 1996 and after hearing counsel and certain proponents and objectors granted preliminary approval of the Consent Decree on March 22, 1996. The Consent Decree and a court-approved notice, informing members of the class of their rights with respect to the Consent Decree, was then sent to all known members of the class. The Court subsequently held fairness Hearings on July 15, 1996, July 22,

1996 and July 23, 1996 and had an additional hearing on September 19, 1996.

Upon consideration of the Consent Decree, the relief, awarded therein, and all objections presented by affected class members, and for the reasons stated in the attached Memorandum Opinion, the Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. By approving the Consent Decree, the Court hereby certifies a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996, the date of preliminary Approval of the Consent Decree.

The Court also finds that allowing for "opting out" by those sixteen members of the settlement class who still choose to do so is consistent with the best interests of justice. The Court allows those sixteen members additional time, until November 30, 1996, to reconsider their decision to opt out, and to rejoin the class settlement. Their failure to do so shall preclude them from participating in or receiving any of the monetary benefits provided for by the settlement agreement.

The three members of the plaintiff class who had previously asked to "opt out" of the proposed settlement and have now asked to rejoin will be allowed to do so and it is so ordered; and it is further **ORDERED** that the

Consent Decree be **APPROVED**, with the exceptions noted.

11/7/96
Date

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*, Plaintiffs,	)	Civil Action No. 86-2850 (SS)
v.	)	
WARREN CHRISTOPHER, Secretary of State, Defendant.	)	

MEMORANDUM OPINION

(Filed Nov. 7, 1996)

This matter comes before the Court for consideration of a Consent Decree entered into by the parties. Plaintiffs' case was originally brought in October of 1986, so it has taken ten years to reach this proposed settlement. The Court attributes this delay to the complexity of the action and the settlement discussions, as well as to the untimely death of the judge to whom this case was originally assigned.

The Consent Decree seeks to resolve all claims that were or could have been brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 *et seq.*, by any African-Americans who were "Foreign Service Generalist Officers" or "Foreign Service Generalist Officer" career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The Court held preliminary fairness hearings on the proposed Consent Decree on March 18, 1996 and March 21, 1996. The Court held additional hearings on July 15, 1996, July 22, 1996, July 23, 1996 and September 19, 1996. During those hearings, the Court heard sworn testimony from members of the putative class who both supported and opposed the consent decree. The Court also heard argument on various matters related to the Consent Decree by counsel for the parties.

Members of the Plaintiff class testifying at those hearings have identified several issues that were of concern to the Court in its evaluation of the proposed Consent Decree. The Court has corresponded with the Secretary of State in an effort to address some of those concerns, and the correspondence is a part of the record. Several of these issues have subsequently been addressed by the Department of State and the Court hopes that several other concerns will yet be addressed by the Department. One issue, that of possible "opting out" of the class of present and former FSOs by those who desire to do so, will be resolved by the Court's decision here.

The Court has reviewed the parties' Proposed Joint Findings of Fact and Conclusions of Law and adopts them as its own with certain minor modifications. The Court's Findings of Fact and Conclusions of Law follow.

FINDINGS OF FACT

Background

In June 1984, Walter J. Thomas, an African-American former Foreign Service Officer ("FSO"), filed an administrative EEO class complaint on behalf of himself and

other African-American FSOs, alleging discrimination regarding post and duty assignments, performance appraisals, promotions, censuring, and selection out. In May 1986, Bernard Johns, who is also an African-American former FSO, filed an individual administrative complaint alleging racial discrimination for failure to promote him from grade FO-02 to grade FO-01 and for not receiving an assignment for which he had bid.

Following denial of Mr. Thomas' class complaint by the agency, on October 17, 1986, Walter J. Thomas and Bernard Johns filed their original complaint in this action. The complaint alleged that the Department of State engaged in discriminatory employment practices and retaliatory behavior in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Specifically, the complaint asserted that: (1) the State Department discriminated against black FSOs in assignments, performance appraisals, promotions, tenure, and selection out and (2) that the Department had retaliated against black FSOs for objecting to these unlawful employment practices.

The State Department denied each of Plaintiffs' allegations, contending that: (1) the Department had complied with the letter and spirit of Title VII, and (2) the Plaintiffs did not satisfy the requirements for class certification. Plaintiffs filed their first motion to certify the lawsuit as a class action on January 15, 1987, prior to taking any discovery. They sought certification of a class of all black Foreign Service Officers and career candidates employed by the Department of State at any time after January 20, 1984. Plaintiffs' motion for class certification was denied by Judge Revercomb on July 20, 1987.

On April 28, 1988, Judge Revercomb denied reconsideration of the motion to certify a class action, but granted Plaintiffs' motion to file an amended complaint thereby allowing 30 additional individuals to intervene in order to assert claims of discriminatory employment practices and retaliatory behavior against the Department similar to those asserted by Plaintiffs Thomas and Johns. Following several status conferences, the Court indicated it would consider a renewed motion to certify the class.

Between 1988 and 1994, class counsel obtained in discovery more than 60,000 documents, and hundreds of answers to interrogatories, and they took more than 60 hours of depositions of State Department witnesses regarding the employment practices at issue. In addition, class counsel retained Economic Research Services, Inc. "ERS"), a Tallahassee, Florida, based economic consulting firm which has considerable experience in employment discrimination cases, to perform statistical and other studies on a "stipulated" computerized database of information provided by the State Department in discovery. This database consists of 93 separate computer tapes and over 1000 pages of explanatory memoranda, printouts, and other documents. Working at class counsel's direction from 1988 through 1995, ERS performed numerous alternative analyses of more than one million individual personnel transactions recorded on the database occurring from 1981 through 1994, pertaining to over 6000 FSOs of all races. The primary objective of these analyses was to determine whether statistically significant evidence of racial discrimination against African-American FSOs existed in any State Department employment practices covered by the complaint.

The State Department retained Longbranch Research Associates to create the stipulated data base and to analyze data with respect to Plaintiffs' allegations in this case.

On December 6, 1991, shortly after the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100, the Plaintiffs moved the Court for leave to file a Second Amended Complaint to demonstrate that their claims against the Department were based on a disparate impact as well as a disparate treatment theory of liability and to request a jury trial, compensatory damages, pre-judgment interest, and expert fees, which were not available to Plaintiffs prior to the enactment of the Civil Rights Act of 1991.

By order dated June 2, 1993, the Court established December 1, 1993 as the date for filing a renewed motion for class certification. At the parties' request, on September 21, 1993, the Court suspended discovery and the previously established litigation schedule in order to permit the parties to pursue settlement negotiations. After the deadline for completing those negotiations was twice extended, and in the absence of an imminent settlement, on February 14, 1994, the Court directed counsel for the Plaintiffs to file their renewed motion to certify a class by June 15, 1994.

On June 2, 1994, Plaintiffs withdrew their Second Amended Complaint, on which the Court had not yet ruled, and moved the Court for leave to file a Third Amended Complaint which renewed the claims in the Second Amended Complaint, designated four additional

class representatives, and updated certain factual representations. On June 8, 1994, the Court granted Plaintiffs' motion.

Plaintiffs filed their Motion for Class Certification on June 15, 1994, and the State Department filed its opposition to Plaintiffs' motion on September 14, 1994. Both parties supported their filings with detailed affidavits from their statistical experts. However, as a result of the progress reported by the parties in settlement discussions which continued, at the Court's request, under the supervision of Magistrate Judge Alan Kay, the class certification hearing was scheduled and postponed several times. During negotiations, the parties met with Magistrate Judge Kay on more than 15 occasions.

In February 1995, counsel for the class and the Department reached an agreement in principle to settle the case. Various Plaintiffs opposed some of the elements of this agreement. Negotiations between the parties continued in order to finalize the details. On January 31, 1996, counsel for the plaintiff class agreed to recommend a settlement to the approximately 360 class members. The terms of the settlement are embodied in a Consent Decree, which was signed by counsel for the parties on January 31, 1996, and then submitted to the Court for its approval.

To determine whether the proposed Consent Decree was fair, reasonable, and adequate, the Court followed the two-step procedure suggested in the Manual for Complex Litigation § 30.44, at 241-42 (2d ed. 1985). First, the Court held a Preliminary Hearing on March 20, 1996. This was: (1) to determine whether the proposed agreement

was within the range of an acceptable settlement justifying final approval and, if so, (2) to arrange for providing notice to the members of the class and affording them a hearing to determine whether final court approval should be granted. At the Preliminary Hearing, the Court heard extensive presentations from counsel for the parties, counsel for individual class members, and, separately, from 13 class members. The Court granted preliminary approval on March 22, 1996.

The second stage of the settlement approval process involved sending the proposed Consent Decree to every known member of the class together with a court-approved notice informing all class members of their right to file comments, objections, and any statement of interest in opting out of the settlement. Class counsel, counsel for the defendant, and counsel for some of the individual Plaintiffs all reviewed the notice prior to its approval by the Court. This notice also informed all class members of their opportunity to appear and be heard at a Fairness Hearing on July 15, 1996. The Court's March 22, 1996 order and the Fairness Hearing Notice stated that class members' responses to the Notice and comments on the Consent Decree must be received by the Court on or before June 11, 1996.

With respect to the Fairness Hearing on July 15, 1996, the court-approved notice was sent during the first week of April 1996 to all known class members as follows:

> (a) To class members in the Foreign Service assigned to State Department positions in the United States and to class members separated from the Foreign Service but employed by the State Department in a Civil Service or contractor

position, the required documents were delivered by State Department internal mail. The documents delivered through the State Department's internal mail included an "Acknowledgment of Receipt" form and a pre-addressed envelope to use to return the confirmation form.

(b) To class members in the Foreign Service assigned to non-State Department positions in the United States and to class members who are separated from the Foreign Service but who do not work for the State Department in another capacity and whose last known address is in the United States, delivery was via U.S. registered or certified mail, return receipt requested.

(c) To class members in the Foreign Service assigned to U.S. Government facilities overseas, delivery was via U.S. Department of State pouch.

Of 359 known class members who were sent notice, approximately 30 notices were either returned or delivery was not acknowledged. No class member indicated any deficiencies in nature or timeliness of the notice provided to them. Nor did any class members complain of lack of opportunity to present to the Court their views in opposition to or in favor of the settlement.

In addition, in accordance with Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2, all FSOs and career candidates employed by the State Department as of March 22, 1996, the date of Preliminary Approval, were provided notice that one or more of the terms of the settlement might adversely affect their interests and legal rights and to advise them of the opportunity to file objections or comments and to appear at the July 15, 1996

Fairness Hearing. Accordingly, the Court finds that the conditions of Section 108 of the Civil Rights Act of 1991 were satisfied and that the terms of the Consent Decree may not be challenged hereafter by anyone who either had actual notice of the settlement or whose interests were adequately represented by another person who presented objections at the Fairness Hearing.

The notice of the July 15, 1996 hearing was reasonably calculated, under all of the circumstances, to apprise interested parties of the proposed settlement and afford them an opportunity to comment on the terms of the Consent Decree. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 64, 70-71 (2d Cir. 1982) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)), *cert. denied,* 464 U.S. 818; *see also, Grunin v. International House of Pancakes,* 513 F.2d 114, 120 (8th Cir. 1975) ("the mechanics of the notice process are left to the discretion of the court subject to the broad 'reasonableness' standards imposed by due process"), *cert. denied,* 423 U.S. 864 (1983). The Consent Decree and Fairness Hearing Notice delivered to class members and other individuals reasonably conveyed the information that was required to be communicated and afforded a reasonable time for those interested to comment on the proposed settlement. The objectors had adequate and reasonable opportunity to formulate and present meaningful. objections to the proposed settlement. In all, nearly 11 weeks were available for the preparation and filing of objections between Preliminary Approval of the proposed settlement on March 22, 1996, and the deadline for filing objections on June 11, 1996.

Based on the foregoing, and all other evidence before the Court, the Court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the proposed class certification and terms of the settlement was given to class members.

Relief to the Plaintiff Class in the Settlement

The Court finds that the settlement provides fair, reasonable and adequate relief to the class, as follows:

1. **Prospective and Injunctive Relief**

The Consent Decree provides that an injunction will be entered, effective for four years from the date of this Court's Preliminary Approval, prohibiting the State Department from discriminating on the basis of race in promotions, awards, censuring, terminations, performance evaluations, selection out, post and duty assignments, conal assignments, or training. The injunction also bars the State Department from retaliating against any class member for participation in equal employment opportunity activities.

The Consent Decree requires the following significant internal State Department reforms:

> *Council for Equality.* The Consent Decree provides for a senior level Council for Equality in the Workplace to monitor and advance equal employment opportunities in the Department. The Council will consist of eight high-ranking members of the Department selected by the Secretary of State, including at least one African-American, and will be chaired by the Under

Secretary of State for Management. In response to a suggestion from the Court, the Secretary of State agreed to appoint one additional Council member from outside the State Department and to meet personally on an annual basis with this Council. The Council will review annually data on the racial profile of post and duty assignments and honor award recipients within each Bureau and across the Department, including the profiles of Ambassadorial positions, Assistant Secretary and Deputy Assistant Secretary positions, and all other "program direction" positions. Following its review of the data, reports from Assistant Secretaries and Bureau heads, the Council will meet with Assistant Secretaries and bureau heads to make policy recommendations concerning employment practices that advance the goals of equal employment opportunity in the Foreign Service. Class counsel may submit reports to the Council regarding barriers to advancement or imbalances in opportunity in the Foreign Service on the basis of race which they or members of the class believe exist at the State Department. The Council will also provide class counsel with copies of its annual reports.

Job Analysis/EER Revision. The State Department, with the assistance of an expert consultant, will hire a contractor to conduct a comprehensive job analysis of FSO job duties, including an assessment of the knowledge, skills and abilities needed by FSOs. The expert consultant will then recommend whether the current Employee Evaluation Report ("EER") form used to evaluate FSOs should be modified to ensure that the potential of tenured FSOs is assessed on the

basis of the knowledge, skills, and abilities necessary to perform successfully at the next higher grade and that racial bias is minimized in that assessment. Class counsel will play an active role, particularly in such areas as selecting the expert consultant, reviewing the draft Statement of Work for the contract solicitation, participating on a committee to advise the contractor, and reviewing the results of the job analysis and the underlying data. Performance appraisals determine who is promoted and who is selected out. These steps are designed to assure that the Foreign Service evaluation system relies on objective criteria to predict future success and to address the other concerns that motivated the class action.

EEO/Diversity Awareness Training. The State Department will revise and expand its EEO/Diversity Awareness training and require priority participation by all supervisors of FSOs and, eventually, by all FSOs. The revised training courses draw on successful programs used by other agencies and by private industry. They teach management methods that foster. equality in the workplace and avoid discrimination in evaluations, assignments, and awards. The value of this provision lies in its potential to continue to change attitudes and behavior in the Department long after the Decree itself has expired. Plaintiffs' counsel already have reviewed a draft agenda for each course, including a description of all activities and the goal of each activity. Superior Honor Awards. The Director General appointed a working group to review individual Superior Honor Award Nominations to determine whether these awards reflect the racial composition of the bureaus in

the Department and, if not, to examine the circumstances under which the imbalances occurred, and to make recommendations to redress any particular or systemic problems that are identified. The purpose is to prevent future racial imbalance in the selection process, unless the working group finds legitimate (i.e., performance-based) reasons for the imbalance. Class counsel, after receipt of the raw data provided to the working group, may submit their own recommendations to the working group. Class counsel will also be offered the opportunity to review the report of the working group and to make such suggestions as counsel believe are warranted.

Certification of Selection Out Process. When a Performance Standards Board ("PSB") is considering an African-American FSO generalist for possible selection out, the Department will make its best efforts to include at least one African-American member on the Board. The Department will notify class counsel of its efforts in each instance in which an African-American member is not included on such a PSB. In addition, the Department will certify that the PSB received a briefing on EEO and made its decision on the factors identified in applicable precepts.

Electronic Database. The Department will establish an Integrated Personnel Management System ("IPMS"). The IPMS will permit the Department to collect and analyze data pertaining to personnel functions including but not limited to promotions, awards, censuring, and terminations by race.

Affirmative Action Plan. The Department will maintain and revise the current EEOC-approved affirmative action plan applicable to members of the Foreign Service. Monitoring. The Consent Decree provides a mechanism for class counsel to monitor the Department's compliance with the consent decree. For a total of four years, commencing on the date the Court gave Preliminary Approval to the Consent Decree, the Department shall report the following information, covering the preceding twelve months, to class counsel: total FSO generalist population statistics; program direction, stretch, and training assignments; tenure decisions; honor awards; diversity training; promotions; and selections out. The Consent Decree also provides a mechanism for the parties to resolve disputes concerning application of or compliance with the consent decree. All reports will be filed with the Court, to enable it, as appropriate, to engage in an independent assessment of the implementation of the Consent Decree.

At the Fairness Hearing, Plaintiffs' expert on prospective relief gave his opinion that, after participating in extensive discussions with the State Department and consultations with class members, he had come to believe that the Consent Decree embodies significant reform measures designed to eliminate the barriers to advancement by class members. He also gave his expert opinion that the monitoring and accountability systems in the Decree were "state-of-the art."

2. **Retroactive Relief**

Sixteen class members will receive immediate promotions within the mid-level grades, and one class member will be promoted in the Senior Foreign Service from grade FE-OC to FE-MC. To maximize the remedial long-term effect on discrimination in the Department's personnel system, the seventeen promotions will be awarded to class members currently active in the Foreign Service who have been at their present grade for the longest period of time and who were recommended but not reached for promotion from that grade.

The Consent Decree provides for the selection of an, impartial review panel (the "Review Panel") to make reinstatement decisions and decisions concerning termination damages. The panel consists of three members, one chosen by the 30 original named Plaintiffs, one chosen by class counsel, and the third chosen by the first two members. The Panel member chosen by the Plaintiffs through a nomination and voting process is a social anthropologist, an educator, and a former country director in the Peace Corps. Class counsel chose an attorney who served as counsel to the Deputy Attorney General, exercising oversight responsibility for issues affecting civil and political rights, and who previously worked in the Civil Rights Division of the Justice Department. Those two Panel members selected as the third panelist a former FSO who served as Ambassador to Malawi and Uganda and as Consul General in Capetown. Following their selection, and subsequent to an interview with the Court, Panel members received court appointments. Their work and decisions, cloaked in quasi-judicial immunity, were discharged in exemplary fashion.

The Panel completed its work successfully and, on July 11, 1996, submitted to the Court its Decisions and Recommendations.

The Department will provide reinstatement with new five year limited term appointments as Junior Officer Candidates to four class members who did not obtain tenure while they served as Foreign Service officer career candidates. The four reinstatements were offered to individuals selected by the Review Panel from a negotiated list of eligible class members according to the criteria set forth in the Consent Decree. The factors for selection included: (1) evidence that the class member was recommended for tenure by a Foreign Service Commissioning and Tenure Board but did not receive career status for other reasons, e.g. failure to clear language probation; (2) evidence of the percentage of recommendations for tenure based on the number of performance evaluations that are officially part of the class member's performance file; and, (3) evidence of the time the class member spent in the Foreign Service before being separated. A list of class members eligible for reinstatement is contained in a Confidential Exhibit to the Consent Decree.

The agreement provides for the class to receive a total award of $3.8 million in satisfaction of all class claims for monetary relief. $125,000 will be distributed to the 30 named Plaintiffs (or their estates) in recognition of their efforts to resolve the class action successfully, including $40,000 to Walter J. Thomas, the lead plaintiff,[1] and $85,000 pro rata among the 29 other named Plaintiffs.

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[1] Mr. Thomas has elected to opt out of the settlement, so he will not receive this or any other sum from the settlement.

$2.9 million will be distributed to class members who did not receive promotions or whose promotions were delayed. That money will be distributed according to a formula based on the amount of promotion delay experienced by each class member beyond the median time calculated by Plaintiffs' expert for white male FSOs.

A total of $775,000 has been divided into two pools for distribution to class members who may have been "selected out," i.e., terminated, for race-related reasons. Pool A (at least $200,000) will be allocated on a formula basis to 29 class members who were terminated from the Foreign Service on the grounds of "unsatisfactory performance" or who were considered constructively discharged according to the impartial Review Panel established by the terms of the Consent Decree and approved by the Court. Pool B ($575,000) will be distributed to four members of Pool A based on a number of specified criteria applied by the Review Panel as described in Appendix F of the Consent Decree. Pool B is available to a maximum of four class members in Pool A because that is a reasonable estimate of the number of excess terminations shown by statistical analysis. The monetary award to any individual from Pool B is capped at $250,000.

During the first week in June 1996, class members were notified of the preliminary calculations of the amount of their individual "promotion damages" awards. Under the terms of the Consent Decree, 265 class members would receive an average award for promotion damages of $10,900. Class members who did not qualify for this type of award include those who were promoted at or faster than white males, the comparison group used

for damages calculations or those who were excluded under the damage distribution provision of the Consent Decree (Exhibit F) because they achieved the personal rank of Career Minister or Career Ambassador, or because they served as Chief of Mission regardless of personal rank. Seventeen class members who upon final approval of the Consent Decree will receive immediate promotions to the next highest grade were also notified of their promotions in early June 1996.

The Review Panel also reviewed the applications of eight class members who applied for reinstatement and, as provided for in the Consent Decree, selected four. The Panel also analyzed the applications of thirty class members who applied for "termination damages" awards from "Pool A" and "Pool B." The Panel selected twenty-nine class members, who will receive an average Pool A award of $16,400. The Panel then selected four class members for Pool 3 and awarded them an average of $75,000. The Pool B awards ranged from $40,000 to $120,000. All Pool A and Pool B recipients were notified of their awards in early June.

Ninety-one of 359 class members, as well as two non-class members, filed comments regarding the Consent Decree. Thirty-four class members submitted comments in support of final approval of the Consent Decree and fifty-five class members objected to various provisions. Class members filed objections claiming inadequate individual and/or class-wide relief, inadequate injunctive and/or prospective relief, and inadequate monitoring provisions. Several class members did not identify their objections. Two non-class members filed objections

asserting that the relief provided by the Consent Decree constitutes reverse discrimination.

At the July 15, 1996 Fairness Hearing, the Court heard from all class members who appeared and chose to testify. Of the 14 who spoke, 3 testified in favor of the settlement, 8 were opposed, and 3 were ambivalent or neutral. Two groups of objecting Plaintiffs retained separate counsel to present their objections. The Fairness Hearing continued on July 22 and on July 23 to permit counsel to respond to the Court's questions about the Consent Decree. At the close of the July 23 hearing, the Court directed the State Department to send a second notice to the twenty-seven class members who had indicated through testimony at the Fairness Hearing or in written comments their preliminary interest in "opting out." The notice required those twenty-seven to file a motion to opt out, to explain the reasons for their request, and to provide the legal authority which supported their request. The notice required those class members to respond by September 3, 1996.

Nineteen class members filed motions with the Court seeking to opt out of the settlement (three class members subsequently withdrew their motions and have been reinstated in the settlement). The Consent Decree itself does not expressly permit or prohibit opting out. The State Department maintains that the Court does not have the legal authority to permit "opt outs" under the circumstances of this case because the class sought certification under Rule 23(b)(2). Counsel for the 16 class members who seek permission to opt out contended that the Court has the discretion to permit opt outs. The Court addresses this issue below.

3. Legal Fees

The settlement provides for the distribution of $2.1 million in legal fees and expenses as set forth in Exhibit K to the Consent Decree. Defendant's counsel stated at the July 15, 1996 Fairness Hearing that the sum of $2.1 million was offered separately from the $3.8 million offer to settle the monetary claims of the class. The sum of $2.1 million includes reimbursement for expenses in excess of $650,000 actually incurred by the firms listed in Exhibit K of the Consent Decree. The balance of approximately $1.4 million represents compensation for the time spent by counsel and persons working at their direction.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs, the law firms of Akin, Gump, Strauss, Hauer & Feld, L.L.P. and Walter & Haverfield devoted more than 30,000 hours to litigating and negotiating the settlement of this case. This reimbursement is considerably less than the rate provided under the guidelines established by *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), which applies to the determination of legal fees in Title VII cases in the District of Columbia circuit.

Additional Findings

In addition to those findings of fact included above, the Court further finds as follows:

– Upon consideration of the number and extent of negotiating sessions, the close involvement of Magistrate Judge Alan Kay, and the compromises reached on the specific settlement terms, the Court finds that the Consent Decree was the

product of arm's length bargaining and that there was no evidence of collusion;

– Based upon the report of the Review Panel and testimony from the Review Panel at the Fairness Hearing, the Court finds that the Review Panel reached its decisions according to the guidelines and procedures set forth in the Consent Decree and that its decisions were fair and reasonable;

– The reform measures undertaken by the State Department together with the four year injunction against discrimination and the provisions enabling class counsel to monitor the State Department's progress in implementing the terms of the Consent Decree are fair, adequate and reasonable prospective relief measures; and

– The award of $2.1 million in legal fees and expenses is reasonable and justified in light of the duration of this case, the relief obtained for the class, and the fact that the amount of legal fees and expenses represents a compromise that is appropriate under the facts and circumstances of this settlement.

CONCLUSIONS OF LAW

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, prohibits discrimination in employment on the basis of race. Specifically, Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

religion, sex, or national origin . . . " 42 U.S.C. § 2000e-2(a)(1).

Title VII also makes it unlawful for an employer to "limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . . " 42 U.S.C. § 2000e-2(a)(2).

Certification Of The Settlement Class

The parties have agreed that the Court, by approving the Consent Decree, shall be certifying a class of all African-Americans who are or were State Department Foreign Service Generalist Officers or Foreign Service Generalist Officer career candidates at any time between January 20, 1984 and March 22, 1996, the date of Preliminary Approval of the Consent Decree.

The practice of certifying a settlement class simultaneously with the approval of the pre-certification settlement is widely accepted. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157, (S.D. Ohio 1992) ("tentative settlement can precede or be concurrent with class certification" (quoting *Clark Equipment Co. v. Allied Indus. Workers of America*, 803 F.2d 878, 881 (6th Cir. 1986))); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989); *In re Beef Industry Antitrust: Litig.*, 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *see also Herbert Newberg & Alba Conte, Newberg on Class Actions* §§ 11.22, 11.27 (3d ed. 1992).

By granting the requested certification, the parties will be able to avoid protracted litigation and effectuate a

settlement that will provide immediate and substantial benefits to the members of the class. Moreover, given the lengthy, active, arms length negotiations between the parties and the fairness of the settlement, there is no danger of abuse of the settlement class device in this case.

Federal Rule of Civil Procedure 23 (a) explicitly sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the class representatives are typical of the claims of the class; and, (4) the class representatives will fairly and adequately protect the interests of the class. In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the three subsections of Rule 23(b).

The Court's concludes [sic] that the class does meet the requirements of Rule 23(a) as follows:

Numerosity (Rule 23(a)(1)). This provision focuses on the practicality of joining all prospective class members in a single lawsuit. Where joinder is impractical, a suit may be maintained as a class action in the interest of judicial economy and to ensure access to the judicial system. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Although Rule 23 requires no minimum number of class members, numerosity is generally satisfied by a proposed class of at least 40 members. *Committee of Blind Vendors v. District of Columbia*, 695 F. Supp. 1234, 1242 (D.D.C. 1988) (63 class members satisfy numerosity requirement); *Sperling v. Donovan*, 104 F.R.D. 4, 7 (D.D.C. 1984) (46 class members).

In this case, the known class consists of approximately 360 members, which includes more than 260 individuals actively employed by the State Department throughout the world. The Court concludes that the sheer number and wide dispersion of members of the proposed class renders joinder practically impossible.

Commonality (Rule 23(a)(2)). The requirement that a class action present common questions of law and fact is intended to ensure that every member of the proposed class has been subject to the same discriminatory employment practices. *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). Commonality requires proof that the treatment challenged as discriminatory was a "standard operating procedure – the regular rather than the unusual practice . . . statistical evidence, for example, may suffice if the disparities in treatment are significant." *Wagner v. Taylor*, 836 F.2d 578, 592 (D.C. Cir. 1987) However, it is not necessary that each class member have suffered from the policy in precisely the same manner, only that the alleged discrimination stem from that same general policy. *See, e.g., Rossini v. Ogilvy & Mather, Inc.* 798 F.2d 590, 597-98 (2d Cir. 1986)

To demonstrate that the claims of each class member involve common questions of law and fact, the plaintiff class introduced evidence to support their contention that statistically significant disparities existed in the rates at which white officers and black officers are tenured, terminated, assigned, and promoted. The Plaintiffs also asserted that the existence of common questions of law and fact was established because the State Department's key personnel procedures are centrally administered,

highly subjective, and applicable to all class members throughout their careers.

To support their assertion, Plaintiffs argue that a successful Foreign Service career depends on performance evaluations, which represent a supervisor's subjective assessment of performance. Plaintiffs assert that the evaluation procedures which applied during time periods relevant to this case did not provide objective standards to ensure that impermissible considerations, such as race, did not play a role in performance appraisals. Further, Plaintiffs argue that because promotions depend entirely on the comparative rankings determined by selection boards, one officer might have been promoted over another whose performance was indistinguishable from the first officer's but identified as merely "outstanding" rather than "superlative" by that rating officer. Plaintiffs claim that the existence of common questions of law and fact was further demonstrated by the participation of 30 individuals as Plaintiffs in this lawsuits [sic]. The affidavits each filed with the First and Third Amended Complaints attest to how the State Department's policies affected his or her career and illustrated that the claims asserted are common to the class.

The State Department presented analyses disputing the existence of statistically significant disparities based on race and opposed Plaintiffs' contention of the existence of common questions of law and fact by noting that the Department's personnel system is highly decentralized.

Upon consideration of the entire record in this case, however, the Court finds that this case presents common

questions of law and fact and satisfies the requirement of Rule 23(a)(2).

Typicality (Rule 23(a)(3)). The typicality requirement is to ensure that the class representatives have suffered injuries in the same general fashion as absent class members. *Wagner v. Taylor,* 836 F.2d 578, 591 (D.C. Cir. 1987). Because the elements of commonality and typicality tend to merge, *Falcon,* 457 U.S. at 157 n.13, where Plaintiffs establish commonality by proving class-wide harm caused by a subjective, centrally administered personnel system, typicality is satisfied by the same showing. *Id,* at 159 n.15. As with the requirement of commonality, the facts and claims of each class member do not have to be identical to support a finding of typicality. *Wagner,* 836 F.2d at 591.

In this case, to demonstrate that the class representatives' claims are typical of the class claims, the Plaintiffs assert that class representatives Thomas, Williams, Fields and Marquis all experienced discrimination in assignments, having been assigned to less desirable posts than other career-enhancing positions for which they qualified and bid. Plaintiffs Latimer, Marquis, Williams, and Fields claimed discrimination in tenuring, having experienced irregularities or delays in the tenuring process or having been terminated from the State Department for failure to obtain tenure. All of the class representatives claimed promotion discrimination, having been delayed or denied promotions they deserved. Finally, Plaintiffs Thomas, Williams, and Fields claimed they were terminated from the State Department for alleged poor performance or failure to receive tenure as a result of their performance.

The State Department contends that the class representatives did not present claims typical of the class because no single class representative suffered from all of the employment practices being challenged in the case and because the plaintiff intervenors, given the diversity of their individual allegations, did not meet the minimum criteria under the law for the creation of sub-classes.

Upon consideration of the entire record in this case, however, the Court finds that the experiences of the class representatives are typical of the allegations in the class complaint and satisfy the requirements of Rule 23(a)(3).

Adequacy of Representation (Rule 23(a)(4)). The adequacy of representation requirement is to ensure that the rights of absent class members are represented vigorously by qualified counsel and by the class representatives. *National Assoc. for Mental Health v. Califano*, 717 F.2d 1451, 1458 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). The Court finds that class counsel have the experience and competence to provide adequate representation to all class members. The Washington Lawyers' Committee has extensive experience including the litigation of more than twenty class actions such as *Kernan v. Holiday Universal, Inc.* No. JH-90-971 (D. Md. 1990); *McKenzie v. Kennickel*, No. 73-0974 (D.D.C.) (Parker, J.); *Berger v. Ironworkers Local 201*, No. 75-1743 (D.D.C.) (Penn, J.); and *Cook v. Billington*, No. 82-0400 (D.D.C.) (Johnson, J.). Akin, Gump, Strauss, Hauer & Feld, L.L.P. is an international law firm with extensive experience in complex federal litigation, including individual and class EEO cases. Carl Anderson of Walter & Haverfield is the former legal counsel to the Governor of Ohio and has experience in a variety of civil rights issues.

In the present action, the predominantly equitable claims of the class arose from a system of personnel actions that have been uniformly imposed on all class members. Moreover, all the class representatives share the same commitment to assure that racial discrimination does not occur at the State Department and have vigorously prosecuted the claims raised in this lawsuit, even though in the context of settlement some of the class representatives may have differed with class counsel and with the class over the amount and distribution of damages. Ultimately, the adequacy of the named Plaintiffs' representation is determined by the terms of the settlement itself. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §§ 11.28, at 11-59 (3d ed. 1992) ("in the settlement context . . . the adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative").

The Court concludes that the settlement was clearly negotiated at arm's length and presents no danger of collusion. The following factors support this finding: (1) the size and complexity of the Consent Decree and the compromises reflected therein; (2) the context in which it was reached, that is, after more than nine years of litigation; (3) the fact that the settlement is the result of more than 30 months of often difficult negotiations between the parties; (3) the fact that during negotiations class counsel met with class representatives and other class members on more than 125 occasions and held more than 1000

teleconferences regarding various aspects of the settlement; the Court's personal knowledge of the negotiators; and the intervention of Magistrate Judge Kay in the final and other stages of the negotiations. Thus, the Court finds that class counsel and the class representatives fairly and adequately protected the interests of the class.

In addition to meeting the prerequisites of Rule 23(a), the class must be properly categorized under Rule 23(b). In this case, Plaintiffs moved for certification under Rule 23(b)(2), which authorizes class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Advisory Committee Notes to Rule 23 recognize that subdivision (b)(2) was intended for civil rights cases such as this one where "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. The parties also submit that certification under Rule 23(b)(2) is not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. *Probe v. State Teachers Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 71 F.R.D. 666, 671 (S.D.N.Y. 1976).

The relief sought by the class, and secured by the terms of the Consent Decree, includes extensive injunctive and systemic relief in addition to monetary damages. The parties submit that, in cases where monetary relief is

sought, certification under Rule 23(b)(2) is precluded only if the final relief sought relates "exclusively or predominantly to money damages." Rules Advisory Committee Notes to 1966 Amendments to Rule 23. Accordingly, the Court finds that the class in this case meets the requirements for certification under Rule 23(b)(2).

The Consent Decree and the Interests Of The Class

The Court has concluded that the approval of the Consent Decree is in the best interests of the class.

Federal Rule of Civil Procedure 23(e) imposes a duty on the Court to review all class action settlements in order to determine whether approval is warranted. Rule 23(e) provides in relevant part that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The requirements of Rule 23(e) are to "ensure that class actions are not settled or compromised to the undue detriment of others, normally absent class members who will be affected by the terms of the compromise." *Brooks v. State Bd. of Election*, 848 F. Supp. 1548, 1552 (S.D. Ga. 1994); *Officers for Justice v. Civil Serv. Com'n of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1882) (Rule 23(e) protects "class members, including the named Plaintiffs, whose rights may not have been given due regard by the negotiating parties"), *cert. denied*, 459 U.S. 1217 (1983); *Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981) ("requiring notice to putative class members

. . . insures that [their] interests will be protected"), *cert. denied*, 456 U.S. 917 (1982).

In approving a proposed settlement agreement, the district court must determine that the agreement is "not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned." *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983); *Leverso v. SouthTrust Bank of Ala.*, 18 F.3d 1527, 1530 (11th Cir. 1994); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291, (9th Cir.), *cert. denied*, 506 U.S. 943 (1992); *Luevano v. Campbell*, 93 F.R.D. 68, 86-91 (D.D.C. 1981).

The Court concludes that the settlement reached in this case is the product of extensive, non-collusive negotiations between the parties conducted through the most critical stages by Magistrate Judge Kay. There is no evidence of fraud or duress, as demonstrated by a number of factors, including the length and complexity of the Consent Decree, the compromises reflected therein, and the fact that the settlement occurred only after years of extensive discovery.

The Court's determination is guided by a variety of factors including: (1) the strength of Plaintiffs' case on the merits balanced against the amount offered in settlement; (2) the opinion of counsel on the fairness of the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the length, complexity, and expense of further litigation; (5) the reaction of class members to the proposed settlement and their opposition, if any, to the settlement terms. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.), *cert. denied*, ___ U.S.

___, 114 S. Ct. 2707 (1993); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990); *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004 (E.D. Wis. 1984).

Although the relative importance of any single factor depends on the circumstances of each case, balancing the strength of the plaintiff's case against the terms of the settlement is generally regarded as the most important. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *Parker v. Anderson*, 668 F.2d at 1209; *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("[I]f the settlement offer was grossly inadequate . . . it can be inadequate only in light of the strength of the case presented by the Plaintiffs.").

The settlement provides broad prospective relief which the Plaintiffs could otherwise secure only by prevailing at trial on all issues. Under a realistic projection of potential litigation outcomes, it is unlikely that the class, if certified, would prevail on all issues. Thus, a more narrowly tailored injunction would be entered, and it is unlikely that class counsel would be able to monitor the impact of the reform measures on class members on which they did not prevail at trial. Although several prospective reform components in the Consent Decree also have been implemented pursuant to the settlement of the women's class action, *Palmer v. Christopher*, class counsel's ability to monitor those provisions is essential and can only be guaranteed through this settlement. The

Court therefore determines that the certainty of prospective relief secured by the settlement, when compared to the uncertain outcome of litigation, is in the best interests of the class.

Prospective relief measures are as follows:

Promotions. The class will receive 17 immediate, new promotions. Plaintiffs' counsel presented arguments during settlement negotiations that demonstrated a maximum shortfall in the promotion of African-Americans in the range of 40-47. That analysis aggregated data across the mid-level grades and for all years covered by the lawsuit and counted as a promotion "event" the failure of a class member to be actually promoted from one grade to the next. Plaintiffs' counsel and experts had no statistically significant evidence of promotion discrimination in the junior grades or the senior grades of the Foreign Service. In the senior grades there were too few class members to make statistical analysis meaningful.

The State Department disputes Plaintiffs' aggregation analysis and contends that, after controlling for appropriate variables, its maximum exposure was 10 "promotion events." According to the Department's statistical experts, a promotion event was a calendar year and, to the extent a shortfall existed, was properly remedied through monetary damages rather than actual promotion to the next grade. The Department asserts that Plaintiffs' analysis counted the same officer multiple times because promotion boards met annually and often promoted an officer upon subsequent review. Further, the Department contends that the shortfall of 10 applied only from grade

03 to grade 02, the only grade where a statistically significant shortfall even arguably existed.

In settlement, counsel for the parties agreed to 16 actual promotions for mid-level grade class members and one promotion within the Senior Foreign Service from grade OC to grade MC based upon analysis of the litigation risk that, if defendant's statistical model was found persuasive and Plaintiffs' model was rejected, Plaintiffs would obtain few, if any, actual promotions.

The Court determines the agreement to promote 17 class members to the next highest grade according to the procedures outlined in the Consent Decree to be fair, adequate, and reasonable.

Terminations/Reinstatements. Four class members who were separated for failure to achieve tenure will be reinstated into the Foreign Service as a result of the settlement. During negotiations, the parties disagreed over the accuracy of portions of the stipulated database pertaining to tenure and terminations of FSOs previously granted tenure. Class counsel argued that all performance based terminations should be aggregated for analytical purposes, including career candidates denied tenure and officers separated for alleged poor performance.

The State Department contends that separate analysis was required for tenure decisions and performance-based terminations of those officers who had previously received tenure. The State Department initially maintained that, after analyzing all post-1984 tenure decisions, there was no statistically significant disparity in the tenure rates of African-American career candidates. The

Department reached the same conclusion for the performance-based separation of tenured officers. In addition, the Department asserted that an insufficient number of class members were denied tenure or separated for poor performance to certify a class on either issue, whether separated or combined for analysis. Accordingly, the Department refused to offer any reinstatements.

In light of the litigation risks presented by the parties' conflicting views on the correct data, the proper statistical methodology for analysis, and the likelihood of certifying this issue, the parties agreed to the reinstatement of 4 class members who failed to achieve tenure for limited five year appointments as Junior Officer Candidates, with the opportunity to obtain tenure.

The Court concludes that, because of the litigation risks, the agreement to reinstate 4 class members at the junior level according to the procedures outlined in the Consent Decree is fair, adequate and reasonable. Nonetheless, as the Court has mentioned on several occasions during the course of these deliberations and as it expressed in a letter to the Secretary of State, it would also be fair and appropriate for the Department to establish voluntarily some process for looking at the 15 or so individuals who now seek reinstatement but who were denied it because of the arbitrary limits of the settlement agreement. In the letter, the Court expressed its view as follows: "Because the settlement limits the number of persons reinstated to four, it was my view that a safety-valve mechanism might be devised to assure that there would be no injustice to any individual because of the numbers limitation set forth in the settlement."

Monetary Relief. The class will receive a total of $3.8 million.

The Supreme Court's decision in *Landgraf v. USI Film Prods.* ___ U.S. ___, 114 S. Ct. 1483 (1994), foreclosed retroactive application of certain provisions of the 1991 Civil Rights Act amendments, including the right to a jury trial and compensatory damages, to acts occurring before the effective date of the Act Relying on *Landgraf,* the government took the position that prejudgment interest would not be available in this case. Accepting this position in consultation with their statistical experts, class counsel developed a projection of defendant's financial exposure on all damages issues in the range of $2.5 to $4 million. That estimate was based on its experts' detailed promotion back pay calculations and analyses of the stipulated database, and it represented counsels' assessment of the most likely outcome of successful litigation.

Relying on analyses performed by its statistical experts, the State Department vigorously disputed Plaintiffs' damage estimates and calculated that its maximum damage exposure ranged from $725,000 to $1.5 million.

Evaluation of an appropriate monetary settlement required the parties to assess the litigation risks attached to the class certification, the competing experts' statistical analyses, and a showing as to each challenged employment practice.

If litigation had continued, relief to the class would have been delayed for several years. In the event that a class would be certified on all issues, the parties then would have to complete a trial on the merits, a likely appeal by the losing party, and, then if successful, a

follow-up individual "Teamsters hearings" on damages suffered by individual class members. *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). In the absence of a right to collect prejudgment interest, the Plaintiffs would need to recover a far greater monetary award in order to equal the amount to which the State Department ultimately agreed in settlement. In short, the Plaintiffs had to take into account the present value of money when comparing the State Department's final offer to the amount which could reasonably be recovered at the conclusion of protracted litigation. To justify continuing to litigate for five more years, class counsel projected that Plaintiffs would have to recover at least $5.6 million at that time to equal the present value of the $3.8 million settlement amount accepted by class counsel. The calculation of the time value of the $3.8 million monetary award projected over 3-5 years far exceeded Plaintiffs' most optimistic estimate of the likely monetary recovery on behalf of the class.

In light of those combined considerations, the Court does not dispute the statement that a $3.8 million monetary settlement was at the high end of projected litigation outcomes and represents a fair, adequate, and reasonable monetary award to the class.

As supported by the findings of fact in this case, the Court concludes that the classwide prospective and retroactive settlement terms constitute substantial relief which satisfies virtually all of the class's litigation objectives. Thus, protracted litigation is not likely to yield significant additional relief.

In addition to balancing the likely outcome of litigation against the settlement terms and considering the context in which the settlement was reached, the Court must consider the reaction of the class to the proposed agreement. In this case, 55 out of 359 class members, or 15 percent of the class, oppose final approval of the Consent Decree. Court approval of a class action settlement does not hinge exclusively on a vote by class members. In fact, under well established case law, a fair, reasonable, and adequate settlement will obtain court approval notwithstanding a significant number of objectors. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *Isby v. Bayh*, 75 F.3d 1911 (7th Cir. 1996) (approval over objections of 131 of 200 member class); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884 (7th Cir. 1985) (approval over objections of 15% of 253 member class), *cert. denied*, 478 U.S. 1004 (1986); *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983) (approval over objections by 23 of 27 named Plaintiffs and 15% of 1,500 member class); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (settlement approved despite objections of holders of 56% of outstanding shares); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977) (approval over objections of counsel claiming to represent almost 50% of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974) (approval over objections of approximately 20% of 452 member class).

Further, class action settlement agreements do not require the assent of named Plaintiffs as a prerequisite to Court approval. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n. 19 (4th Cir. 1975) ("Appellants do not argue, nor may

they under the authorities, that assent of the class Plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable."); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) ("To be sure, the assent of named Plaintiffs is not a prerequisite to court approval."); *Horton v. Merrill Lynch*, 855 F. Supp. 825 (E.D.N.C. 1994) (approval over objections of majority of named Plaintiffs).

Even faced with vociferous objection to a proposed settlement, the court has a fiduciary responsibility to protect the interests of silent class members. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987).

In this case, the vast majority of class members (85%) have not voiced any objection to the Consent Decree. That high percentage is certainly evidence that the settlement is not unfair or inadequate in the opinion of the class. Several objectors believed that one or two provisions of the settlement are unfair and asked the Court to disapprove the entire settlement on that basis or to direct counsel for the parties to revise the objectionable provisions.

Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled. After carefully considering the objections, the Court concludes that the Consent Decree as a whole is fair, reasonable, and adequate to the class. According, [sic] the Court will not deny final approval on the basis of those objections.

In addition to the specific factors which guide a court's review of a class action settlement, there is a strong public policy favoring settlement of litigation. The Supreme Court has emphasized the strong Congressional preference for encouraging voluntary settlements of Title VII actions. The Court has explained that "Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . cooperation and voluntary compliance were selected as the preferred means for achieving this goal." *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974). Other courts also have recognized the importance of this policy. *See, e.g., Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.) (approved settlement will not be upset unless court clearly abused its discretion; limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement), *cert. denied*, 459 U.S. 828 (1982); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (reconciliation and settlement are "preferred means for resolving employment discrimination disputes"), *cert. denied*, 439 U.S. 1115 (1979); *In Re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993) (in determining whether to approve class action settlement, the district court must be guided by strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement); *Hammond v. Barry*, 752 F. Supp. 1087, 1100 (D.D.C. 1990) ("well settled that, particularly in class action suits, there is an overriding public interest in favor of settlement"); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.Cal. 1980) ("cooperation and voluntary

compliance are the preferred means for achieving the statutory goals of Title VII").

Opting Out of the Settlement Agreement

Despite the many positive features of the proposed Consent Decree, the Court remains concerned by the number of dissenters. That concern relates to an issue that remains unresolved by the proposed Consent Decree, that of the right of class members to opt out of the proposed class settlement in order to retain the option to bring an individual lawsuit under Title VII. The Court concludes that allowing for "opting out" in this case would be the course of action most consistent with the purposes of the statute, and hereby grants those sixteen members of the class who have indicated the desire to opt out of this class settlement the right to do so.

But the Court will also allow those sixteen members additional time, until November 30, 1996, to reconsider their decision to opt out, and to rejoin the class settlement. After November 30, 1996, however, any of the sixteen members who have not rejoined the class settlement can only gain relief by fully complying with all procedural requirements of Title VII and, if so satisfying those requirements, by bringing their own, separate, individual actions under Title VII.[2] They will receive no monetary benefits from the settlement.

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[2] The Court understands that three members of the plain class who had previously asked to "opt out" of the proposed settlement have now asked to rejoin the settling class. The Court hereby grants their request.

Allowing for "opting out" is consistent with case law and the best interests of justice. It is clear that the Court has the authority to take this action. The authority of a court to approve a Consent Decree in this or any action brought under Title VII is derived from the statute itself and not the consent of the parties. *See Firefighters Local No. 1784 v. Stotts et. al.*, 467 U.S. 561, 576 (1984). The court may modify any such decree to serve the purpose of the statute. *Turner v. Orr*, 759 F.2d 817, 825 (11th Cir. 1985). Particularly is this so in this case, where the parties have specifically presented the issue to the Court for resolution.

In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), the parties presented a consent decree for approval to the district court which arose from a settlement negotiated by the parties. The district court made substantial modifications to that consent decree and the court concluded that it must be certain that a settlement "does not unfairly impinge on the rights and interests of dissenters." *Id.* at 1214. In *Reynolds v. King*, 790 F.Supp 1101, 1107 (M.D. Al. 1990), the court rejected a settlement agreement in a class action challenging the Alabama Highway Department's alleged employment discrimination and warned that a court must be careful to scrutinize whether, under a proposed settlement, the interests of certain class members are sold out.

But the most relevant precedent is *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). In that case, the circuit court held that a district court had abused its discretion by failing to allow opt out from a 23(b)(2) class that was facially unfair. In the decision, the court extensively discussed the applicability of opting out in a (b)(2)

class action and concluded that when the damages stage of such actions take on the appearance of a (b)(3) action, a district court has discretionary power under rule 23(d) to allow "opt out" and design the procedures for such an action. *Id.* at 1153-56. It is appropriate to allow for "opt out" when the monetary relief stage of a particular Title VII lawsuit is functionally more similar to a (b)(3) class than to a (b)(2) class.

Here, Defendant argues that "opt out" should not be authorized in this (or, presumably, any) Rule 23(b)(2) class settlement. Defendant points to the long-standing concern that future defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, and argues that the government did not bargain for a spate of individual claims following settlement.

However, the facts of this matter do not give weight to Defendant's theoretical concerns. Only 16 members have chosen to opt out of the settlement class. Some number of those opt outs may yet choose to opt back in to the class before November 30, 1996, as this Court has decreed; others, likely, may never bring or never be able to support an individual Title VII action. The Court has no reason to conclude with Defendant that those members of the class who would "opt out" are, in fact, those members with the strongest Title VII claims. What is more, if Defendant is right and those who want to opt out do have the strongest cases, what a grave injustice would then be done to those parties if this Court were to extinguish their individual rights.

The Court has been impressed with the vehemence with which some members of the class have opposed the settlement. It is quite clear that those members will believe themselves to have been "sold out" if this Court refuses to allow opt out of the settlement.

At the heart of this issue is the question of what distinguishes a (b)(2) class from a (b)(3) class. "At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness . . . Injures remedied through (b)(2) actions are really group, as opposed to individual injuries." 706 F.2d at 1154. The concern of this Court is that, in the absence of allowing for "opting out" some searing individual injury might be greatly under compensated. It would be terribly unfair to any African-American who may have been denied the opportunity to serve his country at the highest level of the diplomatic corps as a result of employment discrimination to be denied the opportunity to prove his or her individual claim. Justice demands that a defendant not be permitted to paper over any such injury if, in fact, it has occurred.

CONCLUSIONS

The Court wishes to congratulate the parties for performing admirably in resolving a complex and difficult matter. Counsel representing both Plaintiffs and the Defendant have performed in an exemplary fashion. In particular, the Court wishes to single out Magistrate Judge Alan Kay, who mediated the controversy, for his superb efforts. All participants who have worked so hard to resolve this matter should be proud of this settlement. The settlement, in conjunction with allowing for "opting

out" by those who elect to do so, provides an excellent framework for correcting and redressing employment discrimination at the Department of State.

That having been said, the Court does repeat its request that the Secretary of State voluntarily establish some process for looking at the 15 or so African-Americans who still seek reinstatement or some other action with respect to their individual cases. It is surely not in keeping with the spirit of the settlement and the expressed desires of a concerned Administration to deny reinstatement or some other form of action simply because of the admittedly arbitrary limitations of the settlement agreement. While the Court understands that there is some possibility that others within the Department might question the establishment of an ad hoc process, the ability to do so should not be insurmountable.

* * *

The Court hereby finds the Consent Decree to be fair, reasonable and adequate under the circumstances. Further, with respect to the issue presented by the parties as to whether certain members of the class may "opt out" of the settlement, the decision of this Court is to grant them the right to do so. An appropriate order is attached hereto.

11/7/96
Date

/s/ Stanley Sporkin
Stanley Sporkin
United States
District Judge

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Re: Thomas, et al., v. Christopher, Civil Action No. 86-2850: Proposed Settlement / Discrimination Law Suit by Black FSO's

Dear Honorable Judge Sporkin,

A thorough review of the documentation provided as to the settlement of the Thomas v. Christopher suit leads me to the opinion that the settlement is going to be beneficial to a very small group of individuals. There are 29 or 28 plaintiffs or plaintiff/intervenors, depending on whether Edith Spruill is an appropriate party to this proceeding. It is my understanding that she is neither a plaintiff nor a plaintiff/intervenor. However, she has been placed in a select pool of participants who stand to gain the most benefit from the proposed settlement.

I. PROMOTIONAL DAMAGES

As an analysis of the distribution reveals that 16 of the individuals are going to receive 2.9 million dollars of the settlement. These persons are those still employed with the State Department. It appears that the monies allocated to those individuals are for payment of the monies lost for delayed promotions and the pay for the resulting increase in benefits.

This allocation is highly unfair to those remaining individuals who were terminated from their employment based upon the same discriminatory actions of the State Department. These employees are the ones who have been damaged the most and who should receive the bulk of the award. The cost of the promotions and related

expenses should be the burden of the Department of State. The employed individuals, while suffering discriminatory acts at the hands of the Department of State, have been damaged to a far less extent than those whose services were terminated from the service because of the same actions. Those terminated not only lost any chance of a career with the foreign service, but also were thrown into unemployment, some for substantial periods of time. The terminated employees have sustained far more in monetary losses and damages than those FSO's who were retained but not promoted in a non-discriminatory manner.

II. TERMINATION DAMAGES

The termination damages allocation is also unfair. First, the sum of $200,000.00 is to be split among what appears to be 8 or 9 terminated persons. This amounts to about $22,000.00 per person. Taking this figure and adding to the $85,000.00 split among the 29 plaintiffs/intervenors (28?), the total recovery for 9 individuals who are precluded from service employment are going to receive the paltry sum of $25,000.00

Second, there are 4 individuals who will be chosen by some magical means and be entitled to split the sum of $575.000.00, with the possibility of receiving up to $250,000.00 each. Even if the review panel determines to split the $575,000.00 equally among these 4 individuals, this equates to the sum of $143,750.00 each. This, added to the other monies, gives a potential award for these 4 of $165,750.00.

III. REINSTATEMENT

The settlement provides for the reinstatement of 4 individuals to be selected from a named group of 12 (one of whom does not appear to have either been a party plaintiff or a plaintiff/intervenor). The proposed settlement does not make any distinguishment or set forth any criteria or guidelines on how these 12 individuals were selected from the remaining plaintiffs or plaintiff/intervenors. Further, no one will give any explanation as to why all remaining plaintiffs or plaintiff/intervenors were not placed on the reinstatement list. That notwithstanding, here we have 4 individuals who are participating in the distribution of $85,000.00, and a portion of the funds from either Pool A or B, plus receiving a 5 year appointment. The reinstatement gives persons the chance to become permanent employees of the State Department, in addition to receiving compensation.

IV. EARNINGS

In order for this settlement to attain any degree of fairness, those who have been terminated and who are not going to be reinstated should receive the bulk of the settlement. Out of the 28 or 29 plaintiffs or plaintiff/intervenors there are 8 or 9 who are going to receive the least and who have been and are being damaged the most. These are the individuals who are not with the service who will not have any chance at a career with the service. They are the ones who have been left without jobs.

The fairest method of distribution would be as follows:

1. The award of $40,000.00 to Walter J. Thomas;

2. The distribution of one million dollars to those 16 individuals who remain in the service for the promotion damages, using the proposed formula to compensate these individuals;

3. The distribution of $860,000.00 ($775,000.00 plus $85,000.00) to the 4 who received the 5 year appointments; and

4. The balance of the $1,940,000.00 distributed equally to the remaining (9 or 10) non-reinstated non Department of State employees.

This would give each person **somewhat** equal compensation for the racial discriminatory actions of the State Department.

V. OPT OUT CLAUSE & INDIVIDUAL CLAIMS

The no opt out clause is not fair as stated in corresoon6ence to the court – dated September 18, 1995. The individual claims filed against the Department of State should not be subsumed in the settlement of this lawsuit without a fair hearing.

VI. SUMMARY

Under the best case scenario the proposed settlement is grossly unfair because the terminated plaintiff or plaintiff/intervenor stands to receive less than a dollar a day for compensation.

To quote Andrew Jackson, "do what is right between these two parties that is what is fair and that is what I expect."

I remain,

/s/ Odie N. Fields
Odie N. Fields

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, et al., Plaintiffs, v. WARREN CHRISTOPHER, Secretary of State, Defendant.	)	Civil Action No. 86-2850 (Judge Sporkin)

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA:

MOTION TO OPT OUT

The undersigned on his behalf and in proper person hereby moves this Court to allow him to opt out of the settlement being proposed in the above-entitled matter and permit him to be excluded from the class of Plaintiffs.

This Motion is being made pursuant to FRCP 23(c)(2), the following Points & Authorities, and the statement attached.

DATED: This 30 day of August, 1996.

/s/ Odie N. Fields
ODIE N. FIELDS
IN PROPER PERSONA
2500 DICKERSON ROAD, #102
RENO, NV 89503
INTERVENOR PLAINTIFF

POINTS & AUTHORITIES

There are two basic reasons for my request to be allowed to "opt out" of the proposed settlement in this matter. They are as follows:

1. I have been left off the reinstatement list for consideration for return to the foreign service. This has been done with no explanation of the reasons why I was originally placed on the list and then deleted.

2. The proposed settlement is extremely unfair to those who have been deleted from the list. This is explained in my statement.

While there is or has been stated that a party can not "opt out" or be excluded from the proposed class, it appears that this Court has the discretion to allow a plaintiff to such request and to "opt out". The primary focus of the cases which deny an individual class member to opt out is where the relief being sought is primarily injunctive, as opposed to monetary damages.

In this matter, the seeking of a significant amount of monetary damages is one of the primary basis [sic] of the action. If those persons who are not going to be allowed to be reinstated are allowed to be excluded and seek their own relief and if successful, each damage amount could be in the six or seven figure dollar amount, as opposed to the twenty thousand dollars plus ($20,000.00+) currently being offered to settle the claim of those persons not eligible for reinstatement.

Thus, the trend of the Federal Courts seems to be to allow an individual to have the opportunity to get out if there is significant monetary damages being sought. See

Silber v. Mabon, 18 F.3d 1449 (9th Cir. 1994). Also, it would appear from *In Re Joint Eastern & Southern Dist. Absestos Lit.*, 14 F.3d 151 (2nd Cir. 1994), that this Court can allow claimants to opt out in order to fully assert their rights that were in existence prior to the class action. Further, *Bowling v. Pfizer*, 14 F.R.D. 141 (S.D. Ohio 1992), sets forth the criteria necessary and the discrimination of the Court to all participants in class actions to be excluded from the class action settlement.

While I am not an attorney, I have read but do not understand the technicalities of the cases I have read; they appear to give the Court the discrimination based upon my circumstances to request and be excluded from the class action. Especially in view of the unfairness of the settlement towards those who have no opportunity by and through the settlement to have a career in the foreign service.

DATED: This 30 day of August, 1996.

/s/ Odie N. Fields
ODIE N. FIELDS
IN PROPER PERSONA
2500 DICKERSON ROAD, #102
RENO, NV 89503
INTERVENOR PLAINTIFF

BASIS TO OPT OUT

Background

As I relive the horrors of preparing this brief, I do it knowing that I continue to be discriminated and retaliated against by the State Department denying me reinstatement and compensation in lieu of reinstatement of less than a dollar a day.

I joined the lawsuit as one of the original plaintiffs in 1986 after experiencing severe racial discrimination in the areas of: assignments, tenure, promotion, awards and filing of complaints of racial discrimination and retaliation. Thus, I was terminated from the Foeign [sic] Service in 1988 while serving in Tijuana, Mexico.

Regarding my Tijuana posting, as will be referred to in the summary, an affidavit prepared by one of my Career Development Counselors explains the quandary which I found myself in 1986 and still continue to find myself in 1996. The affidavit states that no matter what I did in Tijuana it did not matter due to the fact that Bogota was my proving ground and I had done above and beyond, consequently there should not have been a problem for tenure. Why was I separated from the Foreign Service if this affidavit states that according to her perception and understanding that Tijuana would not matter because I would be separated anyway?

This is when they did end my foreign service career abroad. The next major difficulty I had with the foreign service was in Rome, Italy, where not only myself, but a majority of black Foreign Service Officers have and are presently experiencing racial conflict and separation from the foreign service at a rapid pace or lack of career

advancement. While in Rome, I experienced much to my chagrin a completely different posture towards myself from my supervisors as an American, as a male, and as a black.

My nine year career consisted of the following:

- four overseas assignments
- recipient of five consecutive exceptional performance evaluations
- offered eight hardship posts (including five high threat danger posts)
- forced or tricked into two positions below my personal grade level
- denied five positions at or one grade above personal rank in favor of white Junior Officers
- reneged on issuance of five performance awards between 1984-1985: valor for heroism-1, superior honor with cash-2,
- meritorious honor with cash-2
- removal of two performance ratings
- failed to review personnel file for tenure for three years, then caused my separation for non tenure and covered up the activity
- two tours of duty curtailed by the Department
- twice separated from the foreign service

Non State Department Recognition

- recipient of award from Foreign Ministry of Colombia (for fostering good relations between two countries-first foreign diplomat to be honored)

- recipient of award from U.S. Military Southern Command Headquarters

- recipient of letters of appreciation from OAS and private citizens

Aside from my individual claims of extreme racial discrimination and retaliation as well as the testimonies of other black Foreign Service Officers who have placed faces, minds, and souls on the statistics provided by plaintiff statistician Joan Gustafson Haworth who reports what black officers have always known these racially motivated acts of discrimination did not occur by chance and some got hit with it harder than others.

The following are samples of the statistics provided by plaintiff statistician:

– "An analysis of assignments to hardship posts (i.e. posts that warrant a pay differential because of unfavorable conditions for foreign service officers assigned there) for the years 1984 through 1989 shows that black officers are assigned to hardship posts over all cones at a disproportionate rate. . . . as is the representation of black officers in administrative (service jobs) assignments at the mid level."

– "An analysis of assignments to posts in Africa and Latin America also shows a disparity. The aggregate disparity for (black Foreign Service Officers) was sufficiently great . . . . that it could have occurred by chance less than one time in 1,000,000."

– "An analysis of tenure data shows. . . . in the aggregate, the under representation of black officers receiving tenure was sufficiently large. . . . that it could have occurred by chance was less than one time in 1,000,000."

– "Analysis of competitive promotion. . . . for the years of 1984 through 1989. . . . shows that black officers were under represented in promotion from each grade level and that the overall under representation is statistically significant. . . . the overall pattern of under representation is significantly large to justify an inference that the under representation. . . . did not occur by chance."

– "An analysis of awards received by mid level and senior level generalists shows that between 1984 and 1991, black Foreign Service Officers received disproportionately fewer awards than white officers in the same grade. . . . would have occurred by chance less than one time in 1,000,000."

– "An analysis of termination shows that although black officers constitute only 5.32% of all those terminated from 1984 through 1991, black officers constituted nearly 11% of those terminated. . . . the probability of such over representation. . . . is statistically significant (less then four out of 1,000.) . . . at least more black Foreign Service Officers were terminated than would have been expected." I was one of the terminated officers.

As persuasive as my individual case, plaintiff statistics or the Clark and other reports chronicling half of a century of racial discrimination and the resistance to tearing down the barrier of discrimination, may be, the consent decree has failed to provide me with an adequate and respectful settlement of the damages caused to me by the

extreme acts of racism. Although my name was on the reinstatement list and I gave Counsel permission to use my name as class representative for the tenure issue of mid level officers based on the strength of my case, mysteriously and suspiciously my name was dropped and replaced on the list without consultation, without explanation, and without fair compensation.

In other words, the maneuvering in the settlement of this case along with the last minute insertion of the no opt out clause over the majority objections of plaintiffs and intervenors, including myself, has placed me in a lose-lose situation. Interesting enough the officers identified as replacing me on the list and never identified as a plaintiff or intervenor has been placed in a win-win position because regardless of how this case turns out she will be awarded reinstatement to pursue her career and a cash settlement. Whereas, I along with others are being forced to continue this battle for justice. A quote by Benjamin Webster is very applicable here, "whenever you find a trout in your milk you know that something is fishy."

Reinstatement

As previously documented, and I reiterate, the settlement provides for the reinstatement of 4 individuals to be selected from a named group of 12 (some of whom do not appear to have been either plaintiffs or intervenors.) The proposed settlement does not make any distinguishment or set forth any criteria or guidelines on how these 12 individuals were selected from the remaining plaintiffs or intervenors. Further, no one will give any explanation as to why all the remaining plaintiffs or plaintiff intervenors

were not placed on the reinstatement list. That not withstanding, here we have 4 individuals who are participating in the distribution of $85,000. and a portion of the funds from either Pool A or B, plus receiving a 5 year appointment. The reinstatement gives these persons the chance to become, **permanent employees not temporary employees,** of the state Department, in addition to receiving compensation, medical, and retirement benefits. This is simply unfair due to the set of circumstances which I have been subjected to that were unavoidable; no matter what I did or did not do there was no way I could avoid those earth shaking and unexpected sequence of events that have severely harmed me and financially and physically. My good name and reputation have been tarnished.

One of the arguments being made against reinstatement of the individuals who were "selected out" or denied tenure is based on the statistical data that only "X" and "Y" officers would have succeeded, therefore no more can be considered. This theory provided by the Justice Department and Counsel for the plaintiffs begins the question. All of the persons involved were victims of discrimination either through removal from the service or denial of advancement and promotion. The statistics can not factor in which of the individuals would have made a successful career with the State Department had it not been for the insidious efforts of some and the lack of concern by others to cause the discrimination of all from attaining tenure status of full fledged foreign service officers.

While the statistical data is a wonderful tool in establishing that discrimination existed in curtailing and staggering the careers of black Foreign Service Officers, it can

not establish or show the ability of each of the individuals to succeed in the foreign service officer profession. This is especially true when no one will tell how and why certain individuals were selected for the reinstatement list and others wore not or were dropped from the list: This statistical data can not show the individual capabilities, therefore a more open and equitable approach must be taken to resolve this matter.

The only civil, dignified, and sincere resolution for this case is the "dugri" approach which means a simple, direct, and honest approach with great respect for all persons involved:

1. Allow each plaintiff to elect whether he/she desired to be reinstated, and if so, require reinstatement without restrictions and with the restoration of all rights and benefits, promotion, and awards based upon the statistical criteria presented and back pay; or

2. Allow those who do not wish reinstatement to be compensated with back pay and front pay. This could be accomplished by either negotiated settlement or allowing the person to pursue individual action without delay.

The State Department must be made to understand that a price must be paid for violation of laws. If it is not required to pay a heavy price, it will do it again, as it has in the past, and as it is presently doing as this case is being resolved. The State Department has had the liberty of reeking havoc and destruction in the personal lives and professional careers of black Foreign Service Officers for **more than fifty years**. An **ombudsman** appointed by the Court would be the crisis management vehicle for the **21st Century** mandating that the State Department face a

crisis rather than deny its existence; the ability for the State Department to fully reveal rather than cover up any wrong doing; the ability for the State Department to correct errors and develop a solid and effective management crisis plan; the State Department must implement such a plan with swift speed.

In weighing the pros and cons of the proposed settlement of this case, the manner in which I was separated and the manner in which the reinstatement issue has been handled, as well as the paltry financial compensation, I have no other alternative but to request opt out.

A SAGE NOTE

It has always perplexed me and still does to this day why my counselor while I was in Tijuana, Mexico was so blatantly contradictory in the way that she handled my placement and future with the Foreign Service. She was, in the chain of command, considered to not be a person that would design and implement policy and procedures; however, her ultimate superior the Director General would have been keenly aware of the reasons why the negative things which were occurring at the time were actively taken place with me as the sacrificial lamb. Why did she begin the placement with the language which I interpreted as being positive as far as it not really mattering what I did in Tijuana (I would always do my best irregardless); I would have no trouble whatsoever being tenured in her opinion due to my excellent performance in former posts? What, who, and how the stream changed directions in regard to my future with the Foreign Service is yet to be determined? I think and feel as a detective

would in attempting to decipher the entire carefully coded language and actions which the Foreign Service concocted in regard to my foreign service career.

To reiterate, initially my counselor felt certain that I would eventually be tenured; what transpired in order for her to change the flow and direction of the stream? Why and who directed her to inform me that the chances of my ever being tenured with the Foreign Service were doomed? In my opinion, my counselor had not been prompted and was highly unaware of the carefully coded language and actions which her supervisors were busy planning, scheming, and implementing in order to make certain that I would not only not ever work with the Department of State again, but even more obscene, they wanted to make certain that I would not ever be able to work again, anywhere. I was duped.

In other words, there was once a method in which human beings were exterminated via racial genocide, that was atrocious and barbaric; however, presently the means in which racial genocide is planned, schemed and implemented is via unemployment. If an individual is unable to be fully and gainfully employed, that individual will not be able to exist on this planet any longer, a slow death.

The long range plan was and still is to make certain that educated blacks that respect themselves and others due to the fact that the mere reason that they are educated is what will set them free (Frederick Douglass) is too much of a threat to the old bastion which predicated and required the utmost allegiance to racism in order to eradicate and to totally exterminate all blacks that truly

believed that their education would indeed set them free. The old guard, i.e., Rome post, that completely protects racism at all costs, is slowly but surely being placed in a coffin one bone at a time but they are not going down without a fight for their greatest fear is fear itself (Theodore Roosevelt) in that they are not able to exist in a world where they have complete control be it politically, economically, and/or socially speaking. This is the dilemma which I find myself in currently. The dynamics are far beyond what most individuals would care to perceive as reality in September, 1996. There must be power for all rather than power for a few; for what is power if it is not shared and cared for by many.

Conclusion

In closing, I must analyze and re-analyze my request to opt out of the proposed settlement of this case which is a most difficult decision that will not only prolong my agony of impoverishment and cause me the losses of irreplaceable prized personal and family possessions through bankruptcy public auction scheduled for September 1996 but it appears to be the only avenue available for me to secure justice at this juncture.

The decision to not offer me reinstatement and offer a pittance of monetary damages and not explain why my name was dropped from and replaced on the reinstatement list is not something I can consider as fair. Moreover, I find myself in the very same predicament in 1996 as I did in 1986, with people wrapping themselves within a cloak of secrecy and refusing to make full disclosure of decisions and actions made against me. Ten years ago, the

State Department refused to divulge the reasons for non tenure which led to my separation and now, in 1996, counsel refuses to reveal the reasons for non offer of reinstatement, the dropping and replacement of my name on the reinstatement list.

In weighing the pros and cons of the proposed settlement of this case, the manner in which I was separated and the way the reinstatement issue has been handled as well as the paltry monetary settlement I have no other alternative but to **request opt out.**

MEMORANDUM

TO: Carl E. Anderson, Esq.

FROM: Odie N. Fields [/s/ ONF]

DATE: October 8, 1995

RE: Thomas, et al. v. Christopher
Civil Action No. 86-2850

TOPIC: Reinstatement Denial Explanation

Per your October 5, 1995 memorandum, it is imperative that you thoroughly understand the third paragraph in which you convey hope that your memo dispels notions of reluctance or refusal on your part pertaining to calculations. In my case, you have refused to provide me with the reason why I have not been reinstated, how the list of ten was derived, and how the final four will be selected. Your refusal has caused me grave distress.

How was the compromise reached and why was it done without my input? Why have you refused to provide me with why I have not been reinstated? I am particularly concerned since learning for the very first time that a compromise was made when the list was established recalled your chuckling when responding to me on the telephone that you knew the reason but could not tell me.

I cannot agree to this settlement until I have been told why I was not reinstated and how Pool B calculations will be determined, mainly how will they receive their settlement money.

A copy of this memorandum has been forwarded to Judge Sporkin.

ADDENDUM: 1. When is the fairness hearing, (Oct., Nov., or Jan.)?

2. I do not agree with the "no opting out" clause.

3. Since legal counsel already has our files, why are we not being informed who will be included in Pool B, the monetary value of each case, and when will the monetary amount be provided to plaintiffs/intervenors.

[p. 134] receive more than $70,000 for the 11 years that he has fought this case?

THE COURT: Well, we will consider that. But the point that I'm only making to you is you got several decisions to make. One is the opting out. Two is to bring your own lawsuit, and what I was suggesting to you since you haven't been told, I think for your own benefit you should – in other words, you can still oppose it without having to opt out, and still be able to obtain any sum that you're entitled to.

I only mention that, because, you know, I understand how you feel and the solidarity aspect of it is important, but you should still make your own decision based upon all the information. And you don't have all the information. That's all I'm trying to tell you.

THE WITNESS: I appreciate that.

THE COURT: And as an intelligent individual, you know you don't make decisions unless you have all the information.

THE WITNESS: I appreciate what you're saying. Your Honor, but I don't think it's going to in any way change my view that the consent decree, the deal that was cut between the lawyers is fundamentally unfair if it does not restore the career of people like Walter Thomas who was a victim.

THE COURT: No, all I'm mentioning to you is that you don't have to opt out to be able to get that

message [p. 135] across. You could still oppose the settlement.

THE WITNESS: And I do oppose it.

THE COURT: Do you understand the distinction I'm saying?

THE WITNESS: Yes, sir.

THE COURT: If you opt out, and you're not prepared to bring your own discrimination case. I don't know who you're helping. I'm only mentioning that again to give you all that information.

THE WITNESS: But we're not at that point yet, are we, sir?

THE COURT: I think we are. I don't think you have to do it at this moment, but I think that's something you got to consider. In other words, opting out really is for those people who are going to take that next step, because otherwise if they're not, then the only people that – I don't know what happens to the money and the – we don't know what happens to the excess money.

THE WITNESS: Well, if I can make a suggestion, if I opt out, the money that was due me, give it to Walt Thomas on my behalf.

THE COURT: Well, that may well be possible. That may well be possible. That may well be possible.

THE WITNESS: I'll sign anything that would be necessary. Any kind of legal instrument to give him the [p. 136] money.

THE COURT: Well, that may well be possible. That's a good point. Otherwise, if you don't do something like that, it may well go back to the State or the government.

THE WITNESS: We wouldn't want that.

MS. HUTCHINSON: They have a remainder clause in this. There is some sort of remainder clause in the consent decree.

THE COURT: There is a remainder clause.

MR. BIRCH: She's wrong. If he wants to give his money to Mr. Thomas, and assuming Mr. Thomas doesn't opt out or for that matter if he wants to give his money to Mr. Thomas, we don't care. That's between him and Mr. Thomas.

THE COURT: Well, I don't know the tax consequences. That's the only thing.

THE WITNESS: Whatever it is, I'll –

THE COURT: Is it taxable, this money, by the way?

THE WITNESS: Yes. You might well have a very giving nature to you, but I don't know if you want to be able to give that much.

MR. BIRCH: He can give him the net, Your Honor, but, you know, that's between him and Mr. Thomas.

THE COURT: All right. Let's get to the next witness. You've been very helpful. Good luck in your next [p. 137] assignment.

Who is the next –

(Witness excused.)

THE DEPUTY CLERK: Is it Odie N. Fields?

ODIE N. FIELDS, SWORN

THE COURT: Ms. Hutchinson, you're up.

THE WITNESS: If you don't want to ask – I don't want to make a statement.

DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. If you would state your name and your address and would you tell us what you think about this consent decree.

A. My name is Odie –

THE COURT: How do you spell that?

THE WITNESS: O-D-I-E, Nelson, N-E-L-S-O-N, Fields, F-I-E-L-D-S. My address is 2500 Dickerson, D-I-C-K-E-R-S-O-N, Road, Apartment 102, in Reno, R-E-N-O, Nevada, N-E-V-A-D-A.

THE COURT: I'll ask the questions. Where do you stand on the settlement?

THE WITNESS: I oppose the settlement, Your Honor, as I have stated in writing to the Court, and I again want to personally indicate that I oppose the settlement because I think it's not only unfair, but is a mockery of justice and I think in some ways very oppressive.

THE COURT: When did you start working for the State [p. 138] Department?

THE WITNESS: I began working for the State Department in August of 1978.

THE COURT: And when did you leave the State Department?

THE WITNESS: I left the State Department in April 29, I believe, of 1988.

THE COURT: Now, under this consent decree, are you to receive any money?

THE WITNESS: I am to receive a total amount I believe about $77,000.

THE COURT: How much?

THE WITNESS: About $77,000 a total amount. Break that down, it's about I think for about 65 cents an hour and compares to –

THE COURT: Thirty dollars an hour, huh?

THE WITNESS: – $30 an hour for the attorneys, and I think that's a big difference.

THE COURT: What do you do now for a living? Are you retired?

THE WITNESS: I am unemployed and have been since 1991.

THE COURT: What did you do between '88 and '91?

THE WITNESS: Between 1988, April of 1988 until October of 1989, I was unemployed. Which in October of 1989, [p. 139] I obtained a position with the State of Nevada, the same government agency that I had worked for when I began working for the State Department.

After which during that period of time, I came to Washington on a trip, went by the State Department to visit colleagues and so forth and so on, and I did indicate where I was working. About six weeks later I end up losing that job. I was later told that a phone call came from Washington and that was the cause of me losing that job.

I have indicated that in documentation in writing to the Court, as well as to the State Department, an agency of – the Equal Employment Opportunity Commission in order to have that incident investigated as well as other subsequent information in which I have received that the State Department may be interfering in my obtaining work.

THE COURT: When you left the State Department was it for cause?

THE WITNESS: I left the State Department because as they told me, is that I did not – I was not recommended for tenure, and I had prior to that time I had been extended. I think I received extensions to grievances for say about three years from 1986, 1987 and also I received an extension in 1984, based upon a grievance and also an EEO complaint which is still pending within the State Department.

THE COURT: Now, you oppose this settlement, I take [p. 140] it?

THE WITNESS: Yes, I do, wholeheartedly.

THE COURT: And are you going to be someone that's going to opt out on this?

THE WITNESS: Yes, I believe I have no alternative but to opt out.

THE COURT: And that you will, therefore, bring your own case.

THE WITNESS: Yes. I would like to comment, Your Honor, –

THE COURT: Surely.

THE WITNESS: – in regards to my not receiving tenure. As I have submitted to the court and I would like to state at this time is that although I was informed that I was not recommended for tenure, that my file, my personnel file was not reviewed for three consecutive years, 1985, 1986, and 1987.

And that someone made a decision somewhere to try to cover up what had been done. Someone forged the initials on the sheets, because each individual board member is supposed to sign a check-out sheet. Now, in one affidavit from the chairwoman of that board, indicating in her affidavit that in a very clever way in which she is supposed to be signing for as chairwoman, she indicated that one set of initials were not hers. Then, if they were not, then whose were they? Because [p. 141] she was still the chairperson.

Now, and once you look at the sheet, you will see that all of the initials were in terms of the loops and it's very easy for any layman to see. You don't have to have a specialist, that they were signed by the same person. Now, unfortunately, in the system that we have, that they have at the State Department, is that the commissioning and attaining board works like this. They do not sit together as a board, as a unit. People are supposed to go and check out files. They don't work as a group, and they can do whatever they choose to.

And sometimes I would suspect, because they really don't get any additional pay for this function, that what they do if they're in a rush, they have a task to achieve, that in a hurry they just make some marks, either yea or nay or whatever. Depends on what they think.

And in my situation, I ended up on the short end. Now, I'm still baffled. I think I know why, but how can a person's file not be reviewed for – you know, I can possibly conceive it happened, although it shouldn't, for one year, but two and three years?

THE COURT: Has your matter been looked at by the Inspector General of the State Department?

THE WITNESS: No, I wrote to the State Department and asked for the Inspector General's Office to get involved. [p. 142] The Office of EEOCR, the Equal Employment Opportunity Commission Office of State Department indicated that they were handling the grievance and, of course, they really didn't want to get involved.

However, you know, whether they inspect it or whether someone else inspects it, I'm the one who lost my job. And it really should not have happened.

THE COURT: I see. All right.

BY MS. HUTCHINSON:

Q. Were you considered for reinstatement under this consent decree?

A. No, and that's another thing that sticks in my craw. And that is that I am not on the reinstatement list. And I tried to find that out for a number of times, and I have requested this information from counsel. They will not tell me, and when I say will not tell me, they have absolutely refused to tell me.

Now, as I wrote to the Court, in one instance is that Counsel Anderson laughed and said, ha, ha, ha, I know, but I can't tell you. And I still have not been told why. Now, I do know that at one time that I was supposed to be on the reinstatement list, and somehow some magical reason that my name was dropped.

THE COURT: What was your last position?

THE WITNESS: I came in as an FSO-3, and I left out [p. 143] as – I left as an FSO-3. I did not receive any promotions.

THE COURT: In 10 years?

THE WITNESS: In 10 years. Now, during that period of time, I might add, is that, you know, it wasn't because, you know, I was not a good performer in my job, because the last ratings that I received I think about superlatives and outstandings.

Now, during that period of time, which is also baffling to me, is that the promotion boards, one promotion board gave me a meritorious step increase prior to the commissioning and attaining board meeting based on performance. And then the commissioning and attaining board turned around and did not recommend me for tenure.

THE COURT: So your point is you're going to opt out on this, right?

THE WITNESS: Yes.

THE COURT: Okay. Thank you. Next? Let's go.

(Witness excused.)

THE DEPUTY CLERK: Ray Robinson.

THE COURT: Ray Robinson in the courtroom?

MS. HUTCHINSON: Your Honor, these are people who had previously testified, so I thought if we just ran through what their concerns were about the decree real quick –

THE COURT: You're terrific.

RAY ROBINSON, SWORN

[p. 144] DIRECT EXAMINATION

BY MS. HUTCHINSON:

Q. Would you state your name for the record please.

A. Yes, my name is Ray Robinson.

Q. And Mr. Robinson, in terms of this current consent decree, what – how will it affect your status as a Foreign Service Officer currently today? What effect will it have?

A. Well, it will insure that I will be separated from the Foreign Service in little over two months.

Q. And why is that?

A. Because the consent decree is extremely flawed, and it does not allow me as one of the original plaintiffs and one of the plaintiff intervenors to compete for the 17 promotions that were offered in the consent decree.

Q. And what would be your next level of promotion if you received a promotion?

A. I would go from OC to MC, which is within the Senior Foreign Service.

Q. And the consent decree will prevent you from having any eligibility for the promotions that are outlined in the decree?

A. That is correct.

Q. And your last date of employment will be when?

A. I will be separated on the 27th of September.

THE COURT: After how many years?

[p. 145] THE WITNESS: Twenty years, sir.

THE COURT: Would you be eligible for anything, a –

THE WITNESS: They offered me something like $31,000, Your Honor.

THE COURT: As a buy-out?

THE WITNESS: Oh, no, no. This is in the consent decree.

THE COURT: I mean, will you be able to retire?

THE WITNESS: Oh, yes, I'm retirement eligible.

THE COURT: You are retirement eligible?

THE WITNESS: Yes.

THE COURT: And so the reason that you'll not get another assignment is because you haven't been selected for a Foreign Service position; is that it?

THE WITNESS: I wasn't promoted within the seven year time frame, but this I contend was because of the discrimination against me, and I have three unsettled EEO complaints, plus a grievance to this offense.

THE COURT: Now, your position on this decree is you will opt out?

THE WITNESS: Absolutely.

THE COURT: And bring a lawsuit?

THE WITNESS: Absolutely. Well, I don't have to bring. I would want to continue with those I have ongoing. I filed one in 1986, one in 1987, –

* * *

[p. 182] THE WITNESS: I need more time to opt out. I came to this hearing because I was told this consent decree was going to apply to me whether I wanted it to or not.

THE COURT: That's a possibility.

THE WITNESS: Well, that's what I understand. That's why I wanted to know more about it. I didn't like the terms of it, because I felt that the compensation didn't represent what I thought – where I thought I should have been had things been more fairly undertaken. I'd have to really think about whether or not I have the wherewithal to pursue this independently.

THE COURT: And whether you have – how to prove your case I guess.

THE WITNESS: Right. Whether I even have a case.

THE COURT: In other words, your position would be that there is no other way to explain what happened to you other than the fact that there has to be some discrimination, and since you're in both the women's end of it and the racial end of it, you've got two prongs to go on, I assume.

THE WITNESS: That's a good interpretation.

THE COURT: Well, thank you very much. Next.

(Witness excused.)

THE DEPUTY CLERK: Odie Fields.

MS. HUTCHINSON: He's already been called.

THE DEPUTY CLERK: He's asked to make an additional [p. 183] comment.

ODIE FIELDS, RECALLED

THE COURT: What would you like to say? You can stand right there, but I got to go on.

WITNESS: I just want to make a brief presentation, something that I was unable to do. As I have listened to the United States Justice Department attorneys and our primary legal team argue for a complete settlement of this case against out wishes, I am reminded of Sophocles who said there is a point when justice is unjust. For as I understand justice, it must be fair, simple humane, and most of all understanding.

Your Honor, the heart and soul of this case is that unless the person's black and has worked within the State Department's hostile white discriminatory environment, one cannot fully understand the malicious, degrading, concentrated and deliberate discrimination that we have been exposed to and what we have been forced to deal with on a consistent basis. But as you listen, you'll find a most definite pattern of horrible, callous acts of racial discrimination and retaliation.

The lawsuit could have been avoided if the State Department had adhered to the recommendations of numerous studies and reports dating back to 1945. The special efforts of then Secretary of State Dean Rusk who called civil rights [p. 184] leaders from around the country to appeal for assistance in bringing in more Foreign Service Officers from racial and ethnic groups so the Foreign Service would be more representative of the American population.

It also could have been avoided if the congressionally passed 1946 Foreign Service Act which stated as one of its principal objectives to develop and strengthen the Foreign Service of the United States so as to ensure that the officers and employees of the Foreign Service are broadly

representative of the American people and not manipulated the section of that Act that there are only two ways to enter the Foreign Service. One, which is the lateral entry mid-level examination process and the affirmative action laws to benefit white Foreign Service Officers.

It was not fair to us when the State Department for more than a quarter of a century refused numerous attempts to increase the number of blacks in the Foreign Service while they quietly and effectively used the laws to hire more white officers but at the mid-level grades. It was wrong to us when the Department in a highly sinister manner took two lawfully mandated acts, Foreign Service and affirmative action, and used them for the purpose of enhancing the careers of white Foreign Service Officers.

Instead of leaving the program as one, they divided one – they were divided. One was quietly used for white male [p. 185] officers, whereas the other, affirmative action, was stigmatized as lowering standards, inferior, social experiment, and experimental. And we, black Foreign Service Officers, who were employed though the program was labeled as less intelligent, less educated and poor performers.

Your Honor, I know you're rushed for time, but I'd like to say a couple of more things. There was a study done by the State Department, and it was done by Clark, Phipps, Clark and Harris, and they brought out a couple of very interesting things. And it brought out that although we as mid-levels and many of the people that – and even junior officers that came through the affirmative action program, we were castigated and maligned as

being unintelligent and so forth, and we got poor ratings, and many of us were just basically run off our jobs.

And we were labeled as such because we took their oral exam. Whereas many of the white officers, although not all of them, came through the written process. But what came out in that report was that the only thing that the white officers had to their advantage, if anything, was that they were leastwise, and that they came from Ivy League schools.

But one thing that they did bring out was that those same individuals, the white officers, were, and I quote, "frequently had difficulty making decisions and getting along with people who were different." And I think that is the crux [p. 186] of the matter. Because you have an entrenched culture, white officers who don't want certain people within the system.

Now, you asked a question earlier, and I think you were trying to get to what is causing this problem? Sure, there is discrimination, but there has to be a basis. And the white officers, the white male officers who have enjoyed the privilege and they've been entrenched in the system, and they don't want us around, and they do whatever it takes to control our careers to their own advantage, and eliminate us as quickly as possible.

The other thing I would like to say –

THE COURT: Could you hold off? I've got to get these other people.

THE WITNESS: Can I say just one more thing?

THE COURT: All right. Go ahead.

THE WITNESS: Because I came to this hearing, Your Honor, with great hopes, and because I was hoping that something could be resolved. And I would like to leave with the same idea that something is going to be achieved. And because I have been really harmed by what the State Department has done to me, and just as well as these other people.

Because we have a lot of courage to fight a case like this for 12 years, and we can all pat ourselves on the back. None of us have resorted to any kind of crime and become criminals. And that takes a lot. We are the moral [p. 187] examples, because many of us have lost jobs, careers, and many of us are not even working, but we still try to stay out of the system in terms of becoming criminals and we're trying to do the best we can to be the good citizens for the young people who are coming after us. Thank you.

THE COURT: How many of the – can you give me some statistic if you could. There are 359 members of this group; is that it?

MR. SELLERS: 357, Your Honor.

THE COURT: What is the total professional group at the State Department? That's 357 out of how many? Can you give me that figure?

THE WITNESS: No, I don't know it.

MS. WATSON: 4,500.

THE COURT: What is that?

MS. WATSON: 4,500.

THE COURT: Who gave me that figure?

MS. WATSON: I did, Ms. Watson.

THE COURT: 4,500?

MR. BIRCH: I think there are about 4,000 at present Foreign Service Officers.

THE COURT: 4,000?

MR. BIRCH: 4,000 present Foreign Service Officers.

THE COURT: 4,000 or 4,500?

MR. BIRCH: That's a range.

[p. 188] THE COURT: So we're talking less than 10 percent.

THE WITNESS: It's not many. It's a revolving door concept, Your Honor. They bring us in, and they take us out the back door. Bring some in through the front door, and another group is going out the back door. Revolving door. We don't make it.

THE COURT: Let me see if I got this straight. There are 4,500 and only 359. Has that figure changed over the past? I mean, has it increased?

THE WITNESS: Your Honor, I cannot honestly tell you, but if it changes at all, and let me give you a very interesting statistic that I have, and then I'll shut up. It's that at one time there were – I think there were 157 Foreign Service posts, no, 257. You know how many black Foreign Service Officers there were at that time, 256.

THE COURT: I don't understand that. You say there were 257 –

THE WITNESS: Two hundred fifty-seven Foreign Service posts, and 256 black Foreign Service Officers at that time. Because one of these things, Your Honor, that most people don't understand –

THE COURT: What's the point you're trying to – they have one for each post?

THE WITNESS: Well, we actually, Your Honor, I won't say one at each post, but many times that's what it turns out [p. 189] to be. Because we don't have as blacks, we don't have the same type of support and allies that the whites do. Many of us at every post that I've been, there was only me. If I had a problem, I got to call home.

THE COURT: If you had a problem?

THE WITNESS: If I had a problem at the post overseas, I got to call home, you know, find somebody in Washington, call my mom, and this is one of the sad things. My mom died a few years ago, and she died wondering what's happening with her son. One thing I can say proud about my son is that my son he recently said, I'm proud of my dad because he's fighting them.

And even though – and my son, I'm supposed to be paving the way for him. He's having to pay my rent, and this is a sad connotation, very sad, and I did nothing wrong. Did my job, was recommended for all kinds of awards, saving American lives, and by the way, since this is a race case, all of those people were white people. I'm out there risking my black life for some white people. The Colombians were trying to kill us. But I didn't look at them and say, I can't help you, buddy. You know, you're on your own, because, hey, they're not after me.

THE COURT: Was this with the drug business?

THE WITNESS: Yes, this was down in Bogota. I was assigned there. This was during the evacuation. And by the

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[p. 22] tenure they're going to give them makes some sense. Rather than having to do anything else, since you're going to be around to oversee that anyway. Okay. I understand that. So that's four that were denied.

MR. CONNELLY: That's the four. Then we have two people who testified before you last week, Mr. Neal and Mr. Robinson.

THE COURT: Who are up and out.

MR. CONNELLY: Who are up or out, and who have been notified that they are out. So that to my knowledge is the universe of people in that category.

THE COURT: Now, what about the fellow that was so articulate from Reno?

MR. CONNELLEY: That's Mr. Scarlett.

THE COURT: No, that's not Scarlett.

MS. WATSON: That's Mr. Odie Fields.

THE COURT: What is it that's – where is he in this whole –

MR. CONNELLY: Odie Fields was denied tenure, and he received a very significant award from the panel.

THE COURT: He will get –

MR. CONNELLY: He will get a very significant monetary award from the panel.

THE COURT: When you say he was denied tenure, where – does he fit anywhere within the six people we just talked [p. 23] about?

MS. HUTCHINSON: Mr. Fields was mid level, and only junior officers are entitled to reinstatement under this consent decree, so he wasn't entitled to be considered.

THE COURT: Well, I'm going to hear you people.

MR. CONNELLY: That's a correct statement, Your Honor. He is outside the category of people who were eligible to apply for reinstatement.

THE COURT: He was too high?

MR. CONNELLY: Right. His grade at entry was too high.

THE COURT: What happened to him? What happened to Odie Fields?

MR. CONNELLY: He was considered for tenure.

THE COURT: I mean, why – oh, he was considered for tenure.

MR. CONNELLY: He was considered for tenure. I'm not sure. You get more than one consideration for tenure. In other words, it's not a one time decision. I'm not sure how many there are. There could be two or three occasions on which a board, a different board each time would consider you.

THE COURT: And then he was tossed out?

MR. CONNELLY: And he did not get a recommendation.

THE COURT: Did we ever discover who that lady was that impressed me the other day so much?

[p. 24] MS. WATSON: Charlotte Williams.

MS. HUTCHINSON: Her name was Bisa Williams.

MR. CONNELLY: Your Honor, there are two names that have been mentioned. One is Charlotte Williams who is here today.

THE COURT: Which one is Charlotte Williams?

MR. CONNELLY: Charlotte, raise your hand

THE COURT: That's not the one.

MR. CONNELLY: Okay. Then there was a woman who testified named Bisa, B-I-S-A Williams-Manigault. She testified I believe that she had been recommended for promotion but was not getting it. I'm not sure. Your Honor, if that is the person you're referring to.

THE COURT: Do we have the transcript from the other day. This was an awfully – she was a very thin lady.

MR. CONNELLY: That's the one, Your Honor. That's Bisa Williams-Manigault.

THE COURT: I don't know how you describe women any more without getting into trouble.

MR. CONNELLY: Carefully.

THE COURT: Without getting into trouble.

MR. CONNELLY: She was from New York as I recall. She was stationed in New York.

MS. WATSON: At the UN.

THE COURT: I think that's the one. I want to just [p. 25] look at it, and – she didn't seem to be complaining much, but she seemed to be awfully – do you remember what page that would be on? Can someone help me find it?

(Pause.)

THE COURT: Page 176; is that right? Bisa Williams-Manigault. Let me see. Put 176 there. Let's see.

(Pause.)

THE COURT: She's going to get something; isn't she?

MR. CONNELLY: She's getting some monetary relief, Your Honor.

THE COURT: But no promotion?

MR. CONNELLY: That was the issue –

MS. WATSON: It was verbally given by Mr. Connelly in Court and indicated that that could take place –

MR. CONNELLY: Your Honor, could I explain her situation.

THE COURT: Just let me hear this for a second. She's been recommended but has not been reached?

MR. CONNELLY: Your Honor, that's not exactly what's happened. The promotions go to people who were recommended but not reached by a promotion board. So I asked her last week if she had been recommended for promotion, and she said that she had been recommended for promotion. Then I said that she might then be eligible for one of these promotions.

We went back and checked. What the situation is is

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[p. 54] could be that people experienced, and I think that some of the things that individuals had to say about their experience, such as Mr. Thomas and Mr. Latimer showed that this particular relief isn't designed to relieve the discrimination and delays that they suffered, when Mr. Thomas experienced some particular things.

But we would say to the Court that, you know, in terms of these individuals and we've proffered this, that there should be a mechanism where an individual gets a hearing on their individual claim. And that is what we have offered to the defendant, and we believe that the Court is authorized to do that

THE COURT: Which is to do what?

MS. HUTCHINSON: To modify this decree to provide that individuals may get a hearing and proceed on their individual claims. Certainly Pettway authorizes that where people who have objected may be permitted to proceed on their individual claims, and they have objected. They certainly notified all these parties they didn't agree to this. And I don't think that they can be

bound to a decree that they didn't agree to as individual plaintiffs.

THE COURT: Well, where is that document that we had yesterday. I think I've got to look at that. The one with the opting out.

(Pause.)

[p. 55] THE COURT: I've heard you, and let me hear – no, my other friend back there. Thank you. Is there anything further you'd like to say?

MS. HUTCHINSON: No, sir.

THE COURT: You've been very helpful, and I thank you.

MS. WATSON: Good morning, Your Honor.

THE COURT: The only problem I have is it sort of reminds me of a case that I argued once in the Court of Appeals where I was trying to bust a settlement, and I said to myself, God forbid I should win. What am I going to do with it if I win? And that's somewhat what this case reminds me of. If you win, I don't know what you got. You got a whole bunch of – you got another 10 years of litigation.

MS. WATSON: That may be the case, Your Honor.

THE COURT: No, that's serious. That was a case, I forget who it was involving, but there was a settlement.

MS. WATSON: Well, ideally the 16 plaintiff intervenors that I represent would prefer this Court reject

the consent decree as being unfair and inequitable to the plaintiffs and the class of black Foreign Service Officers that they represent.

THE COURT: Now, you represent 16 individuals.

MS. WATSON: That's correct.

THE COURT: Would they, any of them fall within this [p. 56] group that I'm thinking of requesting to be given another shot at tenure or reinstatement?

MS. WATSON: Yes, Your Honor. They are Raymond Robinson, Alfred Neal. Those are the two that will be selected out in September. And Odie Fields, the mid level untenured officer who was denied consideration for reinstatement.

THE COURT: You know, he was very articulate again how he saved those people down at the Embassy down there –

MS. WATSON: Yes, indeed, Your Honor.

THE COURT: Was he cited for that? Did he get a citation?

MS. WATSON: He said that he was, yes, indeed. But he was not given any promotion. He was denied tenure, and he wasn't given the assignments that he'd applied for. And Mr. Robinson and Mr. Neal, likewise have had problems with assignments and have been subjected to –

THE COURT: So that gives you three out of the 16, did you say?

MS. WATSON: That's right. The ones that you're referring to at this time. And I have been in touch with Ms. Manigault. She has not retained me to represent her, but she did submit to me her comments and views on the proposed consent decree that have to do with promotion and her consideration for promotion which might come up in October. [p. 57] And the fact that if she is, indeed, promoted, she'll still be behind and the fact that she would like to see a double promotion as it were. She has some very interesting comments which, you know, we would like to be considered.

However, if the Court rejects this, we may very well have to go to trial on this, and a great number of the plaintiffs that I represent have indicated that they wish to opt out of this consent decree, and that they do not wish to be bound by its terms.

THE COURT: How would that work, the opting out? Let me just read these papers for a second.

MS. WATSON: All right.

(Pause.)

THE COURT: I've just read the – whose version is this? Is this your version?

MR. BIRCH: That's my version, Your Honor.

MS. HUTCHINSON: That's my version. Your Honor.

THE COURT: You can't even agree as to whose version it is.

MR. BIRCH: Can we approach the bench. Your Honor, and take a look at it? I'm sure we can work it out.

MS. HUTCHINSON: That's my version.

MS. WATSON: That's hers.

MR. BIRCH: That's her version. That's my version.

THE COURT: Let me read your version.

DOCUMENT SUMMARY

[Illegible]:
[Title]: Fields Forever (EEO Reprisal, Odie)
Document ID:
[Author]: light 6/6/94
[Operator]:

[Comments]:

Number of Copies: 1
[From] Page: 1 To Page: 6
Starting Print Date/Time: 11/21/95 1:36

[Illegible] MESSAGES on System SYSTEM

STATISTICS

OPERATION	DATE	TIME	WORK-TIME	KEY-STROKES
Created	06/06/94	15:39	:03	27
Revised	06/17/94	17:39	:15	464
Last Retrieved	/ /	:	from:	
Last Archived	/ /	:	to:	
Total Pages:	6	Total Worktime:		2:17
		Total Keystrokes:		5065

To: Jim Thessin and Peter Olson

From: Carol Light

Subject: EEO counseling and investigative services for complaints against S/EEOCR

You have asked for a report on options for the two pending matters involving EEO allegations against individuals in S/EEOCR. When there have been such allegations in the past, the Office of Legal Adviser has performed both the counseling and the investigative functions in these cases.

When this question first arose in January of last year, there was some disinclination regarding L's active participation in the process for several reasons. First was the conflict of interest question – having to assure a separation between the person who did the processing and those who would defend the agency in any resulting hearing. Additionally, relationships between L and S/EEOCR were not at an optimum basis and there was some concern that having L investigate S/EEOCR would further damage the environment. There was also the fact that even though we are attorneys, we were not trained in EEO procedures and techniques. finally, and perhaps most importantly, it was questionable as to whether anyone in L/EP or the "M" group would be seen as being able to take the "neutral roles for EEO counselors, EEO officers, and EEO program managers" which the EEOC's Management Directive envisions.

Last year, therefore, I contacted the EEOC's Office of Federal Operations, which indicated that there was a new office being established which would be willing to do the

pre-complaint counseling as well as the investigation for the Fields complaint on a reimburseable basis. The estimated cost was around $5,000. As I understand what happened, however, the use of S/EEOCR funds to have another agency do the investigation was not authorized. As I recall, it was primarily TJ who said that he did not want to spend "good money to wash our dirty linen in public". There were supposed to be further consultations between Jim and Audrey Morton, but I don't know what, if anything, happened as a result of them. The second complaint process was begun by S/EEOCR employee Marjorie Gross on April 5, 1993 when she sent a memo asking that counseling be initiated for a race and sex complaint she

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[p. 20] rates and things like that.

THE COURT: Well, see what you can come up with. All right. But in the meantime, what you're saying is you don't want to do the discovery until that decision. Let me hear from counsel. In other words, we're not – yes, sir, go ahead.

MR. FIELDS: Your Honor, –

THE COURT: Come on up here. You're recognized. Go ahead.

MR. FIELDS: Good morning, Your Honor. My name is Odie Fields. I submitted some documents to the Court last week, and I understand that they were not reached until –

THE COURT: Until last night.

MR. FIELDS: – last night. However, within those documents that I presented, that there is a very interesting piece of information that was revealed from an affidavit that was provided by Mr. Peter Olsen of the State Department which sheds some light on what is going on here and which I – and I think that many people would not understand.

And I quote this statement that he made in part. "An important new element intervened in the form of a change in policy toward the so-called black officers suit, Thomas versus Christopher. The incoming Clinton Administration determined that the Department should make every effort to resolve that long standing lawsuit, as well as a similar [p. 21] women's class action suit

through settlement and direct substantial resources and attention to achieving such settlements."

Now, President Clinton is in his second administration, and we're still going on with this lawsuit. And it seems that President Clinton will be out of office pretty soon and we have a new president and this lawsuit will continue.

THE COURT: You know something I don't know?

MR. FIELDS: Well, President Clinton, this is his last term, and –

THE COURT: Oh, I see.

MR. FIELDS: – so he cannot run for reelection by statute. And it seems very, very unfair. Not only from – I don't care whether it's political or whether it's from –

THE COURT: Well, is the unfairness to you the fact that you can't go on with your suit now?

MR. FIELDS: Yes, it is, because of the fact that at one time, you know, well, I think that we'd all hoped that this case would be concluded rapidly, certainly much sooner than today. And another thing, too, that I disclosed and you will find in this paper, too, is that the State Department's attorneys [mocked] me in particular by naming me as Fields Forever.

THE COURT: What forever?

[p. 22] MR. FIELDS: Fields forever. That was the name that they gave to me. And, you know, as they delayed one of my last complaint [sic] of harassment and

reprisal against the Department. Now, for these attorneys who are involved in this lawsuit, and these attorneys are second, third attorneys in the State Department, and for anyone, and particularly for attorneys involved in a lawsuit to do something like this is – while they're destroying someone's life, it's not humorous. It's inhumane and, you know, they have caused me in particular, and I'm sure other people involved in this lawsuit, considerable harm and damage.

THE COURT: Look, I've got this other matter, but let me explain to you where I'm coming from, and I understand your concerns.

MR. FIELDS: My point is that we should – they should allow us – the government is not losing anything. And I remember Mr. Birch saying last year and to this Court that he was not – his quote was, "I have a responsibility not to give away the government's money. I take this very seriously."

And I know you said that, you know, hurt legs must be healed, and the agency had been muscle bound and inflexible and so forth, and that they can go ahead and do the right thing.

THE COURT: Well, let me ask you these very things.

* * *

[p. 25] There was an agreement made – the State Department approached me and made an agreement with me, and as a part of this case and that if I did certain things for them in regards to my individual case, then I

would be reinstated within 90 days. That was in 1991. And still they reneged on their agreement.

So what I'm asking for is that they be forced as I requested in my April submission, that they be forced if the Court can possibly do it to honor the agreement that they made with me.

THE COURT: Is it in writing?

MR. FIELDS: No, the agreement was not in writing, but it's substantial documentation back in 1991, '92 and so forth regarding this matter. It's not just an isolated matter.

THE COURT: Well, and you're not represented by counsel?

MR. FIELDS: No, I've also asked that, too, as a part of the April as well as the latest submission that I presented.

THE COURT: Actually what?

MR. FIELDS: That I requested that the Court –

THE COURT: Can we get a lawyer for him? You want a lawyer?

MR. FIELDS: Yes, of course. I just can't do it. [p. 26] I've been unemployed since 1990, and I'm in a state of what you might call genteel poverty.

THE COURT: Genteel poverty? Let me ask you this question. What would you get out of the settlement here? You're not going to get reinstated?

MR. FIELDS: No, no reinstatement, because as they say that I was mid level. They cut a deal. And as I

also told the Court last year, my name was removed from the reinstatement list without any clarification and the attorney, Mr. Carl Anderson, told me, he chuckled and said, I know, but I can't tell you. And they won't tell me.

THE COURT: Wouldn't you come within the Secretary's letter?

MR. FIELDS: Oh, they told me that – I got a letter from Mr. – Director Quainton. And I wrote to them, and they told me that in order for me to be considered for reinstatement with no absolute or no guarantees that I would have to relinquish all of my individual rights, and that – you know how that game goes, Your Honor.

You'd make a request to say that, yes, I will go forward, and then they say, hey, they come back and say, yes, we considered you. You've given up your rights, and you're out. You don't have a case. You have nowhere to go. Now what am I supposed to do?

THE COURT: I didn't think that was the purport of [p. 27] the –

MR. FIELDS: That's a part of the submissions.

THE COURT: – correspondence with Christopher.

MR. FIELDS: You know, the thing is you say one thing. They turn around behind your back and they wiggle around and try to find some avenue to put the screws to us. And that's exactly what they always do. They're always trying to find a way out. And delay and denial. And that's all that's happening in this case. They deny. They delay, and deny, and delay. And we keep going on and on and on. And it's unfair. It's not right.

THE COURT: Well, why don't you go back and tell them that you told your story to Judge Sporkin, and Judge Sporkin thinks that would be an improper condition to place on your speaking to them, and that he wants – he would hope that the Christopher letter would be honored, and that you would be able to present your case to them on an informal basis, reserving all your rights.

MR. FIELDS: Your Honor, Your Honor, well, I can write them a letter. You know, if it wasn't for those two people, I wouldn't be here.

THE COURT: Which two people?

MR. FIELDS: The Lewis', [Edmond] and [Lucia Garcia] Lewis. They have funded my way here. My son cried because he could not, as he usually does, give me the money to come. And so [p. 28] they've been nice to me, and but if it wasn't for them, I wouldn't be here. I wouldn't be alive actually.

THE COURT: Why don't you tell the – you're from Las Vegas, aren't you?

MR. FIELDS: Reno.

THE COURT: Oh, Reno. Why don't you write that letter and you can get a copy of this. She'll prepare it for nothing for you, a transcript of what I said. All right.

MR. FIELDS: Thank you.

THE COURT: All right. Listen, but let us go then, proceed the way we suggest. In other words, up until any motions that are going to be made, and then we'll worry about it at that time, but at that time we should be in November or pretty close to it. Okay.

MR. BIRCH: You want us to draft an order for you, Your Honor?

THE COURT: Well, you can get a draft, but I want everybody to see it and work with my clerk. All right. Anything further?

MS. HUTCHINSON: No, sir.

THE COURT: Thank you very much, people, and I hope someday this will be settled.

(Whereupon, the proceedings were concluded at 11:05 o'clock a.m.)

ODIE FIELDS
In Proper Person
2500 Dickerson Rd #102
Reno, NV 89503
(702) 329-4393

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, et at.,

Plaintiffs,

v.

Civil Action No. 86-2850(SS)

MADELEINE K. ALBRIGHT,
Secretary, Department of State,

Defendant

Emergency Motion For Court Intervention Into Plaintiff's Request For Establishment Of Senior Panel To Consider Reinstatement And Defendant's Non Response.

On July 30, Plaintiff, Odie N. Fields telefaxed a request for the creation of a senior panel for reinstatement consideration in accordance with the July 15, 1997 Court directive. An amendment which included portions of the Court's transcript was telefaxed July 31, 1997 in order to fully comply with the Court's statement and provide background material.

On August 8, 1997, Plaintiff called the office of the Legal Adviser to speak to attorney Melinda Chandler for information on whether a decision had been made on Plaintiff's letter requesting reinstatement. Although, Plaintiff did not directly speak to attorney Chandler, who had witnessed the Court's directive, a message was left

on her answering machine. She later responded that day and left a message on Plaintiff's answering machine stating that although she could not speak for the Secretary, however, it was her understanding that criteria of the Christopher letter still prevailed and because of my "opting out" of the settlement could not be considered for reinstatement.

Believing it was useless going through attorney Chandler for further information, I called the office of the Secretary of State, the afternoon of August 8 and spoke to a male staffer who identified himself only as Richard. He was informed of the urgency for the Department's decision, that a positive decision could possibly "stay" the pending sale of my total personal property by the U.S. Bankruptcy Court; the loses would be unnecessary and could be prevented.

Richard responded that he did not know about the telefax, but would track it down and immediately respond by telephone.

On August 11, 1997, after not hearing from Richard, Plaintiff called him for his answer and was told that Richard had not arrived at work. A message was left for him to call Plaintiff on an urgent basis.

Today, August 21, 1997, two weeks after the initial calls to the Department and almost one month after the telefaxed request for reinstatement, Plaintiff has not received any responses, positive or negative. The Department's actions regarding the handling of this matter can only be considered as retaliatory and request the Court's earliest intervention.

Your understanding of this request is deeply appreciated.

DATED: This ___ day of _____, 1997.

Respectfully submitted,

_____

ODIE FIELDS
In Proper Person
2500 Dickerson Rd #102
Reno, NV 89503
Telephone No.: (702) 329-4393

Certificate of Service

I hereby certify that a copy of the foregoing Emergency Motion For Court Intervention Into Plaintiff's Request For Establishment Of Senior Panel To Consider Reinstatement And Defendant's Non Response was mailed first class, postage prepaid to the following:

Cynthia A. Schnedar
Assistant United States Attorney
Judiciary Center – 10th Floor
555 4th Street, N.W.
Washington, D.C. 20001

Theresa L. Watson, Esq.
110 Michigan Avenue N.E. #F-21
Washington, D.C. 20017

EXHIBIT A

Candidate Program, an alternative hiring route designed to fill the Department of State's special need for officers in the upper ranks of the Foreign Service. Ex. 2.[2]

Plaintiff expressed interest in placement within the political, economic or administrative "cone," three of four prospective career tracks – the remaining being consular – within the Foreign Service. Ex. 3, pp. 4-5. After an initial review of his application by the Personnel Staffing Specialist, the Department sent plaintiff a letter dated June 10, 1992 informing him that he was not qualified to be considered for the political or economic cones because of insufficient experience, but that he would be considered for an administrative cone position. Ex. 4. The Staffing Specialist determined plaintiff potentially was qualified for the administrative cone based on plaintiff's work experience in contracts and logistics. Ex. 13. In contrast, plaintiff's degrees in management and business administration were not relevant to the political and economic cones, and he lacked even entry-level political or economic analysis experience. Exs. 1, 4, 6.

At the request of the Department, plaintiff submitted college transcripts and writing samples to supplement his application. Ex. 5a & 5b. His initial application, including

* * *

---

[2] At some point in 1992, the Department, while retaining the goal of using the mid-level entry program to increase the representation of minorities in the Foreign Service Officer corps, did allow non-minorities to seek entry into the Foreign Service Officer corps through the Affirmative Action Program. Ex. 9.

Date	Financial	Employment	Social	Personal	Health
1996	Bankruptcy continues to plague me; Storage of household effetcs; no money for rent, food, utilities, phone, clothing, etc.	*Blackballing continues; PT School Teacher; PT Umpire; PT Scorekeeper without full time employ-ment.	Not able to interact socially because I cannot pay my my way. Borrowing from friends and relatives makes them not want to see me. I avoid them because of I am self-conscious of my condition; living like a hermit.	Borrowing from friends; continuing to subsist off son and relatives affecting relationships, deteriorating	High blood-pressure; due to poor diet; no money, health, prescriptions, dental, etc.
1995	Same as above except loss of personal belongings, furniture, electronic equipment; due to bankruptcy court agreement	Same as above	Same as above	Same as above	Same as above
1994	Filed Chapter 13 Bankruptcy; borrowing friends; storage of household effetcs; no money for rent, food utilities, phone, clothing etc.	PT School Teacher no full-time employment	No friends, no phone calls, no invitations to accompany or to visit people	Same as above	Same as above
1993	No money; borrowing from friends and re-latives; storage of household effects; no money for rent, food utilities, phone, clothing etc.	No employment Blackballing continues	Same as above	Same as above except loss of relationship with girlfriend due to financial instability	Same as above

1992	Drew unemployment benefits, borrowing money from friends	*No Employment Blackballing continues	Same as above	Same as above Except borrowing from girlfriend	Same as above
1991	Same as above	Same as above	Same as above	Same as above	Same as above
1990	Employed full-time terminated after trip to Washington and visit to State Department, Nov. 1990.	Employed full-time	Unstable social life	Unstable personal life	Continues Blood-pressure and health problems
1989	Living off savings	Unemployed until Nov.	Unstable social life	Unstable personal life	Same as above
1988	Living off savings	Unemployed	Same as above	Same as above except disstressed over loss of employment	Same as above

*Approximately two weeks after I submitted documents to the Review Panel via Akin Gump...I received a telephone call from my employer saying that my license was missing from my personnel file, and did I submit one to qualify to teach. This telephone call was unusual to the extent that I had been working with the school district for three years. This incident parallels the incident of 1990.

In 1990, approximately one month after a trip to Washington and a visit to the State Department to visit friends, I was terminated. In 1992, I was told that a telephone call from Washington initiated the termination. I have not worked full-time since losing that job.

In 1991, I reported various suspicious incidents of black balling to an investigator, investigating an EEO complaint. It was not investigated because the Department of State said that it was beyond the scope of her jurisdiction. (See Attachment 51)

In 1993, a head hunter agency was extremely interested in me the moment they received my resume. The number official of the agency called to advise me to plan for my departure. I did. However, they never again contacted me, and nor did they accept any or return my calls. They just disappeared.

Attachment 13

United States Department of State
Director General of the Foreign Service
and Director of Personnel
Washington, D.C. 20520

October 23, 1986

MEMORANDUM

TO: M/EEOCR – Mr. Clarence E. Hodges

FROM: M/DGP – George S. Vest

SUBJECT: Mr. Odie N. Fields – Mid-Level Entrant

REF: Your Memorandum dated October 15, 1986

I was pleased to receive you memorandum of October 15 requesting me to suspend termination action against Mr. Odie N. Fields for one year to allow time for his administrative action against the Department to be adjudicated. I have carefully considered the arguments you make in support of such a suspension and, on the basis of all the facts, have decided that we should move ahead to terminate Mr. Fields' employment in the Foreign Service.

The Counseling and Assignments Division of PER/FCA will notify Mr. Fields that he has not been recommended for tenure in the Foreign Service and that his separation from the Foreign Service is being implemented. A telegram will be sent to Mr. Fields directly from me DIRGEN CHANNEL to inform him of the above actions. Mr. Fields' limited appointment will expire on November 30, 1986. Because of the short time left before the expiration of his limited appointment, we shall, if necessary, provide

Mr. Fields with a special purpose appointment which will enable him to complete out-processing.

I have also asked the Acting Director of PER/FCA to advise the Consul General in Tijuana by PER CHANNEL telegram of this action. This telegram will contain less detail than mine, but will serve the purpose of formally alerting the senior manager at post so that plans for coverage of positions can be made. Also, Mr. Fields' career counselor, Mr. Gregory L. Johnson, will inform him by telegram of the Career Counseling program offered by the Department and how to enroll in it.

Now, to respond more directly to some of the points raised in your memorandum. First, to the best of our knowledge, no one in PER/FCA told Mr. Fields that his evaluation report from Bogota or the meritorious step increase he received was not in his performance file. A check of Mr. Fields' file reveals that the Bogota evaluation report covering the period 7/30/84 to 4/15/85 was logged into the file on June 28, 1985, prior to the convening of the 1985 Selection Boards. The recommendation for a meritorious step increase made by Board G-III of the 1985 Selection Boards was logged into the file on October 16, 1985 which was after the 1985 Commissioning and Tenure Review Board had convened. But the meritorious step increase nomination was available and on file prior to the 1986 Commissioning and Tenure Board review.

I have decided to proceed with formal notification of Mr. Fields so that he can take whatever steps he feels necessary or appropriate in response. Secondly, I feel that it would be unfair to delay this action until the class action suit now pending against the Department is resolved. No

one knows how long that suit will be in litigation. Finally, Mr. Fields' previous grievance was resolved and he was granted two additional tenure reviews as a result. To my judgment, sufficient opportunity has, therefore, already been provided to Mr. Fields to attain tenure in the Foreign Service.

[LOGO]

United States Department of State
Director General of the Foreign Service
and Director of Personnel
Washington, D.C. 20520

January 11, 1988

MEMORANDUM

TO: S/EEOCR – Mr. Hodges

FROM: M/DGP – George S. Vest

SUBJECT: Mr. Whitehead's 32 Recommendations – Recommendation 26 concerning the Commissioning and Tenure Board

REFERENCE: Your Memorandum of December 2 on the Case of Odie Fields

In your memorandum, you asked that I ensure that the CTB report to your office the reasons for denying tenure to Mr. Fields on October 28, 1987.

As you will recall from our discussions on this idea in principle with Mr. Whitehead, and from my memorandum of July 24, 1987, to Mr. Whitehead on this subject, I have had difficulty in finding a way to be responsive to Recommendation 26. I originally made this clear to Mr. Whitehead when it was first under consideration and before it was forwarded to the Secretary for his approval. I have continued to look for a way to be responsive to the objectives of this Recommendation (hence my memorandum of July 24, 1987 to Mr. Whitehead), but without

success. I believe that the implementation of the recommendation as it now stands would be beyond the scope of my authority.

Moreover, it seems inappropriate to discuss implementing the recommendation in question for only one person, and particularly when that person is in litigation with the Department on the very question of tenuring.

I will be glad to discuss this issue with you, but in the meantime believe that Mr. Fields' proper source of counseling is in PER, where he has access to his FCA Counselor and the Continuity Counselor, who provide counseling to officers whom the Board does not recommend for tenure.

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 98-326 and 98-338

In the Supreme Court of the United States

OCTOBER TERM, 1998

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
HOWARD S. SCHER
Attorneys
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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its application of discretionary factors to determine that members of a class, which was certified under Federal Rule of Civil Procedure 23(b)(2), should not be permitted to opt out of a class settlement.

2. Whether petitioners, as named plaintiffs or plaintiff-intervenors, have a special status that bars a court from dismissing their individual claims as part of a global settlement if they object to the terms of the settlement.

3. Whether the court of appeals failed to consider the adequacy of class counsel's representation.

4. Whether the particular settlement agreement reached in this case was fair, adequate, and reasonable.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-326

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

No. 98-338

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Thomas Pet. App. 1a-19a; Fields Pet. App. 1-25[1]) is reported at 139 F.3d 227. The memorandum opinion and order of the district

[1] "Thomas Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-326, and "Thomas Pet. App." refers to the appendix attached thereto. "Fields Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-338, and "Fields Pet. App." refers to the appendix attached to that petition.

court (Thomas Pet. App. 20a-60a; Fields Pet. App. 29-76) are reported at 169 F.R.D. 224.

JURISDICTION

The court of appeals entered its judgment on March 27, 1998. A petition for rehearing was denied on May 27, 1998. Thomas Pet. App. 61a; Fields Pet. App. 28. The Thomas petition for a writ of certiorari was filed on August 24, 1998, and the Fields petition was filed on August 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal Rule of Civil Procedure 23(b) authorizes the maintenance of three different types of class actions in federal district courts. A class action may be certified under Rule 23(b)(1) if the prosecution of separate lawsuits by each individual member would create a risk of "inconsistent or varying adjudications * * * which would establish incompatible standards of conduct for the party opposing the class," or if the resolution of the individual claims "would as a practical matter be dispositive of the interests of the other members" or would "substantially impair or impede their ability to protect their interests."

A class action may be certified under Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Finally, a class action may be certified under Rule 23(b)(3) if "questions of law or fact common to the members of the class predominate over any questions

affecting only individual members" and proceeding by way of a class action is deemed preferable to "other available methods for the fair and efficient adjudication of the controversy." See *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2245-2247 (1997) (analyzing Rule 23's different class certification options). Rule 23(c)(2) expressly provides that individual members of a class certified under Rule 23(b)(3) must be afforded adequate notice of and the opportunity to opt out of the class action. Rule 23, however, makes no provision for excluding individual members of classes certified under (b)(1) or (b)(2).

2. Petitioners are seven current or former African American State Department Foreign Service Officers who alleged race discrimination and unlawful retaliation by the State Department in a variety of personnel practices. In 1986, petitioners filed a class action lawsuit against the State Department under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioners alleged discrimination on the basis of race, both in the form of disparate impact and disparate treatment, in the Department's policies and practices involving assignments, performance appraisals, promotions, tenuring, selection out, and retaliation. Thomas Pet. App. 2a-3a, 21a-22a, 23a.

Petitioners moved for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). Petitioners alleged that the State Department had acted or refused to act on grounds that were generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Thomas Pet. App. 2a; see also 1 C.A. App. 100 (contending that the case presented "the classic role" for Rule 23(b)(2)).

After lengthy settlement negotiations, the parties entered into a consent decree. Thomas Pet. App. 2a-3a. The parties agreed to seek class certification pursuant to Rule 23(b)(2). *Id.* at 3a. The consent decree was intentionally silent on whether individual class members would be permitted to opt out of the settlement. The consent decree resolved all of petitioners' claims, including attorneys' fees and costs. *Id.* at 3a-4a. The essential features of the agreement are: (1) retroactive promotions, (2) reinstatements, (3) an injunction prohibiting the State Department from discriminating against African American Foreign Service Officers in promotions, assignments, tenuring, and selection out, (4) establishment of a senior-level "Council for Equality in the Workplace" to advance equal employment opportunity and civil rights within the Department, (5) a comprehensive job analysis of Foreign Service Officer job duties and, if appropriate, revision of evaluation forms, (6) revision and expansion of diversity and equal employment opportunity training within the Department, (7) implementation of an approved affirmative action plan consistent with the Equal Employment Opportunity Commission's applicable regulations, (8) creation of a working group to monitor the grant of awards to employees, (9) continued development of an electronic personnel database to monitor employment actions, (10) a duty to report employment information to class counsel for four years, (11) an agreement to undertake efforts to diversify boards reviewing the termination of African American employees, (12) payment of $3.8 million to the class, and (13) payment of $2.1 million in attorneys' fees. See *ibid.* The State Department opposed any opt-outs and, as part of the settlement agreement, attorneys for the class agreed not to advocate a position on the opt-out issue. *Id.* at

4a. The notice of the fairness hearing on the proposed settlement did advise the class members, however, that the district court would decide "whether the right to opt out exists" and that those wishing to pursue opt-out should notify the court of their interest. *Id.* at 65a. Nineteen members initially requested to opt out of the class. *Id.* at 5a.

Following the fairness hearing, the district court entered a final order in which it approved the consent decree, but also allowed the members of the class who previously had expressed an interest in opting out to do so. Thomas Pet. App. 59a-60a. Ultimately, only nine members, out of a class of approximately 360, requested to opt out of the settlement. *Id.* at 5a.

3. The parties cross-appealed. The petitioners appealed the district court's approval of the consent decree. The government objected to the district court's decision to permit opt-outs, on the ground that this Court's decision in *Amchem Products, Inc.* v. *Windsor*, *supra*, barred judicial amendment of Rule 23's textual limitation of opt-outs to (b)(3) class actions.

The court of appeals affirmed the district court's decision approving the consent decree, finding that the settlement was "eminently fair and reasonable to the class as a whole." Thomas Pet. App. 6a. The court carefully evaluated the terms of the settlement in light of the strength of the plaintiffs' claims. *Id.* at 6a-11a. In particular, the court noted that a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *Id.* at 10a.

With respect to the issue of opt-outs, the court of appeals reversed. The court of appeals agreed with petitioners that Rule 23(b) is sufficiently flexible to afford district courts the discretion to grant opt-out rights in Rule 23(b)(2) class actions. Thomas Pet. App.

14a (citing *Eubanks* v. *Billington*, 110 F.3d 87 (D.C. Cir. 1997)). Specifically, the court ruled that Rule 23(d)(5), which authorizes courts to make "appropriate orders" to govern procedural matters, "is broad enough * * * to permit the district court to provide for opt-outs when appropriate in * * * (b)(2) class actions." *Ibid.* The court nevertheless concluded that the district court abused its discretion in permitting opt-outs in this case because (i) the assumption of cohesiveness underlying the Rule 23(b)(2) certification was not undercut by the individual claims for money damages, *id.* at 16a-17a, and (ii) the claims of the class members who sought to opt out were not "so atypical of the claims of the class as to justify permitting them to opt out," *id.* at 17a.

ARGUMENT

The questions for which petitioners seek this Court's review either were resolved in petitioners' favor by the court of appeals or present fact-bound determinations about which there is no conflict in the circuits. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Thomas Pet. 5-10; Fields Pet. 15-17) that this Court should grant a writ of certiorari to review whether the court of appeals erred in determining that the class was not "akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1) and that no other discretionary factors warranted the authorization of opt-outs in this case (Thomas Pet. i; Fields Pet. i). That case-specific and record-bound determination does not warrant this Court's review.

a. As an initial matter, the petition does not present the broad question of whether courts may ever permit opt-outs in Rule 23(b)(2) class actions. Both the district court and the court of appeals agreed with petitioners that courts have such discretion. See Thomas Pet. App.

11a-15a; Fields Pet. App. 13-18; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Because the court of appeals (and the district court) adopted petitioners' arguments in this regard, petitioners are ill-positioned to seek this Court's review of that favorable ruling. Cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980).[2]

Nor do petitioners contend that they have an absolute right to opt out of a Rule 23(b)(2) class action. They advance no such argument in their petitions here and made no such argument below; and both the district court and the court of appeals predicated their rulings on the application of discretionary factors. See Thomas Pet. App. 11a-15a, 54a-57a; Fields Pet. App. 13-18, 72-75; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Nor are we aware of any court of appeals' ruling that has recognized an absolute right to opt out in the Rule 23(b)(2) context.

b. Because the court of appeals applied the very discretionary standard that petitioners advocated, petitioners simply seek this Court's review of the court of appeals' application of that standard to the particular facts of their case. That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981). Indeed, the determination by the court of appeals (Thomas Pet. App. 16a-17a; Fields Pet.

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[2] Although petitioners (Thomas Pet. 5-10; Fields Pet. 16-17) invoke the Due Process Clause before this Court, U.S. Const. Amend. V, that argument made no appearance in petitioners' court of appeals briefs, which acknowledged the discretionary limitations on the right to opt out. See Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9.

App. 18-20) that claims for money damages neither predominated in the present litigation nor undercut the cohesiveness of the class, so as to make the class "more akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1), is a record-specific determination, the resolution of which would offer little practical guidance to other courts' disposition of other cases. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). Similarly, the court's conclusion (Thomas Pet. App. 17a-19a; Fields Pet. App. 20-23) that petitioners' monetary claims are not unique or atypical, so as to justify permitting them to opt out and thus obtain a dispensation different from other class members, is a factual determination that does not merit further review.

Moreover, the court of appeals' application of a standard that limits opt-outs under Rule 23(b)(2) to instances where either individual claims for money damages are sufficiently substantial to affect the cohesiveness of the class, or the individual's claims or injuries are atypical, is consistent with the decisions of other circuits. See, *e.g.*, *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (due process requires opt out in Rule 23(b)(2) action where "substantial" money damages are at issue) (emphasis omitted), cert. dismissed, 511 U.S. 117 (1994); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1302-1305 (2d Cir. 1990) ("courts have narrow discretionary power to allow [opt-outs]" in actions certified under Rule 23(b)(1)); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.) (Rule 23(b)(2) class members have no automatic right to opt out, but district court may grant opt-out as a matter of discretion), cert. denied, 479 U.S. 883 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d

1144, 1151-1160 (11th Cir. 1983) (opt-out permitted in class action certified under Rule 23(b)(2) where money damages claims undercut cohesiveness of the class and made it more analogous to a Rule 23(b)(3) class); *Laskey* v. *International Union, United Auto., Aerospace & Agric. Implement Workers*, 638 F.2d 954, 956-957 (6th Cir. 1981) (no automatic right to opt out under Rule 23(b)(2) and, under circumstances of the case, due process did not require opt-out); *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 506-507 & n.10 (5th Cir. 1981) (opt-outs under Rule 23(b)(2) are permissible, in exercise of district court's discretion, but are not mandatory). Furthermore, the factors that courts of appeals consider in determining whether to permit opt-outs largely coincide. See, *e.g.*, *Brown*, 982 F.2d at 392; *Long Island Lighting*, 907 F.2d at 1302-1305; *Cox*, 784 F.2d at 1554; *Holmes*, 706 F.2d at 1151-1160; *Kincade*, 635 F.2d at 506-507 & n.10 (all—focusing on effect of individual claims on class cohesiveness, class's similarity to a Rule 23(b)(3) class, or the unique facts and circumstances of particular claims). Any minor deviations in the articulation of the opt-out standard would not be of sufficient practical import to warrant this Court's review.

c. Contrary to petitioners' contention (Thomas Pet. 10; Fields Pet. 17), this case does not pose the question presented, but not decided, in *Adams* v. *Robertson*, 117 S. Ct. 1028 (1997) (per curiam), and *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam). The issue in those cases was whether due process required the opportunity to opt out of a Rule 23(b)(1) or (2) class action that "involved primarily money damages claims." *Ticor*, 511 U.S. at 120 (emphasis omitted); see also *Adams*, 117 S. Ct. at 1029 (action "primarily involving claims for monetary relief"). This case, by contrast,

involves "predominantly equitable claims." Thomas Pet. App. 16a, 44a-45a. The district court found, and the court of appeals agreed, that "the plaintiffs sought extensive injunctive and systemic relief in addition to monetary damages," in an effort to correct "a system of personnel actions that have been uniformly imposed on all class members." *Id.* at 16a (quoting district court opinion) (internal quotation marks omitted). The bulk of the consent decree's provisions, moreover, addressed changes in State Department personnel practices and equitable reinstatements and promotions, rather than monetary compensation for class members. See *id.* at 3a-4a.[3]

d. Review is also not appropriate because the court of appeals' judgment that opt-outs should not be permitted was correct. *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 n.11 (1986) (opinion of Stevens, J.) (the Court "reviews judgments, not opinions"). In *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997), this Court held that the class certification criteria established in Rule 23 must generally be adhered to, even when a class is being certified solely for purposes of settlement. *Id.* at 2248-2249. In so holding, the Court cautioned that, when applying Rule 23,

> courts must be mindful that the rule as now composed sets the requirements they are bound to

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[3] For the same reason, petitioners' argument (Thomas Pet. 8; Fields Pet. 17) that the decision to deny opt-outs in a Rule 23(b)(2) action is contrary to *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), is incorrect. *Shutts* "[wa]s limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. The Court specifically stated that it "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-812 n.3.

> enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered.

Amchem, 117 S. Ct. at 2248 (citations omitted).

The text of Rule 23 plainly authorizes opt-outs only for classes certified under Rule 23(b)(3). No opt-out procedure is authorized for Rule 23(b)(2) (or Rule 23(b)(1)) classes. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974). Petitioners' effort to craft an opt-out provision for Rule 23(b)(2) class members thus would substitute "a rule outside the process Congress ordered" for "the rule as now composed," which is contrary to *Amchem*, 117 S. Ct. at 2248. Cf. *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act," courts must "presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Because Rule 23 does not provide for opt-outs in (b)(2) class actions, as it specifically does in (b)(3) class actions, the court of appeals' judgment denying petitioners the right to opt out of this settlement was correct, and further review is not warranted.[4]

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[4] This Court's decision in *Amchem Prods., Inc.* v. *Windsor*, *supra*, further undercuts petitioners' claims of an inter-circuit conflict because all of the cases upon which they rely pre-date that ruling.

2. The Thomas petitioners also argue (Thomas Pet. 10-13) that the court of appeals erred in approving a settlement that dismissed their individual claims without their consent. They assert that the court of appeals' decision is "in conflict with" (Thomas Pet. 11) *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984), and that their special status as named plaintiffs or plaintiff-intervenors required individualized consent before their claims could be dismissed (Thomas Pet. 12-13). That claim does not merit this Court's review.

Cooper decided only that, under traditional principles of res judicata and collateral estoppel, individual discriminatory treatment actions could be prosecuted after a class action had been dismissed for failure to prove that the employer engaged in a general, class-wide pattern or practice of racial discrimination. 467 U.S. at 875-881. *Cooper* thus has no bearing on the present case where, as a result of a global settlement, petitioners' individual claims were resolved and petitioners' only objection is to the amount of their recovery. See Thomas Pet. App. 17a ("[Petitioners] argue merely that they stand to be undercompensated for their injuries.").

Petitioners' reliance (Thomas Pet. 11-13; Fields Pet. 13) on *Mandujano* v. *Basic Vegetable Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); and *Ficalora* v. *Lockheed Calif. Co.*, 751 F.2d 995 (9th Cir. 1985) (per curiam), is similarly misplaced. Those cases held only that, when approving class action settlements, district courts must afford careful consideration to the objections raised by the named plaintiffs, while keeping in mind the best interests of the class as a whole. *Ficalora*, 751 F.2d at 996-997; *Pettway*, 576 F.2d at 1214-1217; *Mandujano*, 541 F.2d at 835. The district court and court of appeals

here did precisely that. Thomas Pet. App. 10a, 53a ("Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration."). The court's ruling thus comports, rather than conflicts, with the decisions of those other circuits, making this Court's review unnecessary.[5]

Petitioners also contend (Thomas Pet. 12-13) that *Deposit Guaranty National Bank* v. *Roper*, *supra*, demonstrates that named plaintiffs have special rights in class action cases. *Deposit Guaranty*, however, decided only that a named plaintiff can appeal a denial of class certification even after his individual claim has been satisfied. 445 U.S. at 332-340. *Deposit Guaranty* is thus of no help to petitioners.

3. Petitioners argue (Thomas Pet. 13-14) that the court of appeals erred in failing to consider whether the agreement of class counsel not to take a position on the opt-out issue deprived the class of adequate representation, as required by Rule 23(a)(4). That argument is meritless. The court of appeals separately reviewed counsels' decision to advise class members that they could petition the court to opt out, but not otherwise to litigate the issue (see Thomas Pet. App. 65a, 178a). The court specifically concluded that counsels' limited posi-

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[5] Petitioners seem largely to object to the differences between the methods for resolving individual and class action lawsuits. It is petitioners, however, who elected to pursue their claims through the vehicle of a class action and enjoyed the "substantial advantages" that can accrue from such a procedure. *Deposit Guaranty*, 445 U.S. at 338. As named plaintiffs, moreover, petitioners had an enhanced opportunity to frame and manage the conduct of the litigation from the outset, including the choice to seek certification under Rule 23(b)(2) rather than (b)(3).

tion on the opt-out issue represented, not collusion, but a permissible compromise necessary to reach closure on one provision of the consent decree. *Id.* at 11a ("counsel more than adequately represented the class as a whole" and "[t]he letter agreement [on opt outs] * * * was part of [the] global compromise between the parties"). In any event, such a fact-specific claim is not of sufficiently broad or enduring importance to merit this Court's review.

4. Lastly, petitioner Fields seeks this Court's review (Fields Pet. i, Question 2) of whether the settlement was fair and reasonable to the class as a whole. That record-specific and fact-intensive claim presents no question of broad or prospective significance that would merit this Court's review. See *Sumner*, 449 U.S. at 543. Such review is particularly unjustified where, as here, the district court and the court of appeals both agreed in their assessment of the record and their application of the proper legal standard to it. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), adhered to on reh'g, 339 U.S. 605 (1950); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).[6]

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[6] Petitioner Fields also argues (Fields Pet. i, Question 3) that the State Department continues to engage in discrimination. Pursuant to the terms of the consent decree, the district court retains jurisdiction over implementation of the consent decree for four years. See Thomas Pet. App. 107a. Accordingly, the proper forum for that aspect of petitioner Fields' complaint is the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1998

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No. 98-338

In The

Supreme Court of the United States

October Term, 1998

ODIE N. FIELDS,

Petitioner,

vs.

MADELEINE K. ALBRIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Contrary to the Department's suggestions, the Court of appeals erred in its decision because the opt outs met the conditions for opting out in the *Amchem Prods., Inc. v. Windsor,* 117 S.Ct. 2231 (1997) and *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997). Petitioners filed their protests against the proposed settlement in their uncertified class action case in a timely manner. Yet the court of appeals still refused to grant the Petitioners opt out requests by ignoring their timely requests as well as meeting all of the conditions in *Eubanks* and *Amchem* demonstrating that Petitioners affirmatively care about their individual claims.

The district court properly allowed opt out during the settlement of the case through its order and certification of the group. *See County of Suffolk v. Long Island Lightning Co.,* 907 F.2d 1295 (2nd Cir. 1990); *cf. Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1997).

1. In its opposition the Department responds that Rule 23 makes no provision for excluding members of classes certified under (b)(1) or (b)(2) (Opp. 3). Thus, in so seeking to justify its position it ignores the fact that Rule 23 in the 1960s is much different in the 1990s. Then Rule 23 automatically enjoined cases because they dealt with segregation as opposed to today when injunctive relief is applied in employment situations. The appendix "Settlement On Class Action For The Courts And Intellectual Property Subcommittee On Judiciary Of The House Of Representatives is used as background information to Rule 23. Pet. App. 1-24.

Employment is the key issue. The Petitioners have lost their positions and any chance of a career as Foreign Service Officers as well as retirement, benefits, etc. due to racial discrimination, retaliation and for some inexplicable reason no chance of reinstatement in the settlement agreement. The Petitioner was arbitrarily removed from his position, arbitrarily removed, replaced on the reinstatement list and refused an explanation as to why he was removed and replaced on the list, and denied the opportunity to even apply for reinstatement even after being directed to do so by the district court. The Department refused to respond to the written and telephone requests from the Petitioner. The district court was informed of this matter but it did not take any action.

2. With respect to the monetary awards, the Petitioner was awarded $78,000, compared to his $51,000 salary in 1988 and the $738,000 (Pet. Reply App. 25) he was calculated to receive in 1995. The difference is significant, unreasonable and unfair. Furthermore, even more unfair is something that money can not take the place of and that is not being able to be an accomplished Foreign Service Officer by being denied the opportunity.

3. The whole argument is about the fairness of the settlement and reinstatement. The district court issued an order on the fairness of the settlement for non opt outs. The Judge never determined the outcome of (b)(2) to (b)(3). He applied it across the board and declared that it was fair to them. Then the court of appeals stated that it was fair to everyone. The decision was unfair because:

(1) reinstatement was not offered to the nine opt outs; (2) why were they not offered reinstatement; (3) how was the reinstatement list devised; and (4) why was the Petitioner's name replaced on the reinstatement list with all his requests for answers ignored and consequently refused an answer? These problems are similar to those in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

4. Contrary to the Department's argument, the court of appeals erred in applying (b)(2) as opposed to (b)(3). The following are the reasons that the court of appeals erred: (1) failing to address the opt out requests in Rule 23; (2) failing to analyze whether the case was (b)(2) or (b)(3) in view of the shift of the case to greater monetary damages caused by reinstatement denials; (3) denying due process rights to Petitioners; (4) not ruling on the arbitrary manner that the nine were not reinstated.

There is a serious question as to whether the case is a (b)(2) or a (b)(3) action. Class counsel submitted a motion requesting that the case be certified as a (b)(2) or (b)(3). The Department did not oppose the request. However, Class counsel did a highly questionable thing. They hastened to settle the case and stipulated a no opt out clause in the agreement over the protests of their clients and signed an agreement with opposing counsel that they would remain silent on the opt out issue, and agreed not to represent any clients who chose to opt out. This would appear to be acts of betrayal and abandonment of their clients and joining the opposition. Shortly thereafter, the

leading law firm Akin, Gump, Strauss, Hauer, and Feld abruptly withdrew from the case. The question is that if the class members cannot opt out of a (b)(2) class action, why was there a last minute effort to stipulate the "no opt out" clause in the settlement?

Finally, the Department has suggested that the Petitioner should return to the district court to resolve acts of harassment and retaliation, which occurred during the settlement of the case. (Opp. 14) The district court allowed the Petitioner to opt out pursuant to individual rights and fairness of the settlement. Fields has taken all the legal steps available to bring his case to a fair and equitable resolution. The district court told Fields to apply for reinstatement, including writing a letter to Secretary of State Albright but they would not even let him apply nor would they respond to his letter or his telephone calls. To rectify the court of appeals to a correct action that said Petitioner should be asking for in district court refer to *Amchem* because the case focuses on the analysis of an opt out situation. Rule 23(b)(3) cases allow opt out because here the ground rules are set and the Petitioner met them due to meeting the conditions and the filing period.

In conclusion, the Supreme Court should overturn the court of appeals decision because of the following:

(1) court of appeals erred in applying (b)(2) as opposed to (b)(3). The court has ignored that Fields has met the conditions to opt out. The court further erred when it said that the Petitioner met (b)(2) when it should have been (b)(3) by refusing to address the opt out issue altogether. He

met all the conditions and did not have an attorney;

(2) court of appeals erred by ruling that the settlement was fair to the entire class, including opt outs;

(3) court of appeals erred by ignoring the arbitrary manner that the reinstatement list was established and the harassment and reprisal that the Petitioner suffered during the settlement process;

(4) court of appeals erred in ruling that the reinstatement of the four nontenured officers was fair without rectifying why the Petitioner was a nontenured officer had his name arbitrarily removed from the list.

The Supreme Court should accept the district court's decision because the court allowed those who opposed the settlement due to unfairness to opt out to pursue their individual cases.

Fields is not only unhappy about the monetary settlement, but to reiterate, he was not even given the opportunity to be employed once again through reinstatement. The question is why? Why was there nonconsideration for the nine opt outs?

Those class members that chose not to question racial discrimination practices were placed on the reinstatement list, received back pay, retirement, benefits and everything else and were not even expecting it. Without employment via reinstatement for even an application, Fields is dead employment wise. He has no vehicle to go back to the district court because the court of appeals ruling caused a dismissal of his case.

If this court were to reverse the court of appeals on the issue of opting out of Rule 23(b)(2) or that the settlement was unfair to the "opt outs", the Petitioner would finally be able to resolve his long standing case in the district court. To date, the erroneous no opt out ruling of the court has deprived the Petitioner of his individual right to bring his case into court for resolution. The basic issue is one of fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, November 4, 1998

Respectfully submitted,

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APPENDIX

STATEMENT ON CLASS ACTIONS FOR THE COURTS AND INTELLECTUAL PROPERTY SUBCOMMITTEE OF THE COMMITTEE ON JUDICIARY OF THE HOUSE OF REPRESENTATIVES

March 5, 1998

***By John P. Frank*[1]**

as invited by the Committee

My name is John P. Frank and I am the senior partner of the law firm of Lewis and Roca, Phoenix, Arizona. I served as a member of the Committee on Civil Procedure by appointment of Chief Justice Warren, as that committee existed in the 1960s when Rule 23 was created. Since that time, I have been involved as a witness or otherwise in a great number of matters relating to the jurisdiction of the federal courts and their procedure. I have been an emeritus but participating member of the Civil Procedure Committee for a number of years, including the years in which Rule 23 has been reexamined. I have repeatedly appeared before this Subcommittee and its Senate equivalent on one or another matters of procedure or jurisdiction. I was chairman for many years of the Arizona state procedure committee, which is essentially identical with the federal system, and have taught jurisdiction and procedure variously at Yale University, the University of Arizona, Arizona State University, and the University of Washington; and I have lectured throughout the country

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[1] Lewis and Roca LLP, 40 North Central Avenue, Phoenix, Arizona 85004-4429, 602/262-5354. He has received no federal grant, subcontract, or contract from any federal source within the past two years.

on these topics. My WHO WHO's and MARTINDALE-HUBBELL squibs are attached to this statement as Exhibit A.

I have had kindly recognition for involvement in work of this kind, most recently the receipt of the Lewis F. Powell, Jr. Award of the American Inns of Court Foundation in a ceremony performed at the Supreme Court. Others who have preceded me in that award include Justice Powell himself, Justice Brennan, and Judge John Minor Wisdom of the Fifth Circuit Court of Appeals.

I. ORIGIN OF RULE 23.

Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times. The social setting had a most direct bearing on this rule. Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was also the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who

must not exploit the whole population, of a fairly simplistic good guy – bad guy outlook on the world, had its consequences.

One other element of the time must be identified: This was a world to which the litigation explosion had not yet come. The problems which became overwhelming in the eighties were not anticipated in the sixties. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Put at its simplest, what new Rule 23 did, first, was expand the true class action somewhat, (b)(1); second, make sure that suits against segregation, as well as other civil rights cases, would be within the class action rule and would be binding as to all members of the class liberally conceived, (b)(2); and third, the one time spurious class action which has been restricted to actual parties was turned into a binding res judicata procedure which could cover a universe as large as notice could reach. It is, I believe, true that (b)(3) was the most radical bit of rulemaking since the original rules created one cause of action and abolished key distinctions between law and equity. The committee repeatedly spoke of it as a "crowning accomplishment."

It was perfectly apparent to the rules-makers of the time that they were doing big things. The critical meeting was October 31 and November 2, 1963, and the most

sharply disputed question was whether to have Rule (b)(3) at all.

There were two levels of concern over (b)(3), apart from details. Remember, the possibility of group securities actions, of RICO and of products liability were still in the future. The sharp practical concern was that major defendants charged with tort liability could readily rig what I will unkindly call a patsy class, arranged to have it sue, have the class take a dive, and thus let the defendants avoid responsibility. It was perceived from the beginning that the class action had the potential of turning the courts into merchants of res judicata, selling that valuable asset at a manipulated price. That was the practical problem and it was more than hinted at from time to time. Remember that this was the era of the Great Society, and "big business" has a very limited stock of trust.

So much for the underlying policy resistance. The legal form which this resistance took was that it was morally and constitutionally wrong to deprive people of their causes of action without their consent. Mind you, this is not long after such cases as *Sipuel v. Oklahoma* or other of the great civil rights cases which had heavily stressed that individual legal rights were personal, not fungible. There was an intense sensitivity to the fact that people should not be swept into a basket; that their rights were independent and personal to them.

Had this problem of individual rights not been solved in a fashion which satisfied that committee, I think there never would have been a (b)(3). There was great concern that in mass torts perhaps there should be no

class actions at all. Professor J.W. Moore gave the illustration of the Ringling Bros. mass tort, the fire in the tent at Hartford. He said that any compulsory class action "goes against my grain of the right of the litigant to run his own lawsuit"; and he repeated a concern I had expressed earlier that "the Pennsylvania Railroad, or some other alleged tort feasor" might take "the initiative to force a concourse of plaintiffs in a particular jurisdiction. I can't think of anything nicer for the general counsel of the Pennsylvania Railroad in the Perth Amboy situation, than your class suit rule."

It was at that moment that committee member Judge Charles Wyzanski had his flash of genius. He responded to Professor Moore, "Would you be satisfied, Professor Moore, if the class could *never* include anybody who specifically protests within a given period?" Professor Moore responded, "That would be helpful" and the principal opponent of (b)(3) added, "If that were done, my problem would evaporate."

Thus, the opt-out concept was born and quickly adopted. Again, it must be perceived that this was not the conception of the "opt-out" of today because the really large class action had not yet been conceived of. Judge Wyzanski was thinking of relatively small classes, and he said of the individual claimant, "If he cares enough to conduct his own litigation," he should "be allowed to do it. He must affirmatively care." Again, it was here assumed that opt-out was an actual conscious choice of a person who had a meaningful alternative to bring his own action. It assumed that the interest of the individual was large enough so that the option of bringing one's own action was a meaningful option. The concept of

thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future. The committee thought that it was making a major policy decision and not that as a practical matter it was simply going to either subsidize or burden future branches of the United States postal system with superfluous mail.

I make this a little more innocent than it was. Professor Kaplan raised the possibility of very large numbers of claims. A couple of other examples were given. But Judge Wyzanski was firm that all those people, even in a giant case, would have to have notice:

> I think you also have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached.

It is a great tribute to Judge Wyzanski's foresight that the Supreme Court has since held that notice and an opportunity to opt out is constitutionally required in class money claim cases. *Phillips Petrol. Co. v. Shutts,* 472 U.S. 797, 812 (1985).

It is with that understanding that the rule was adopted and it was with that understanding that the notes contain the famous restriction that this rule would rarely, if ever, be used in mass tort cases. As a member of the committee, I dissented from the (b)(3) portion of the rule on the grounds that the classes would be too easy to rig and that if a pharmaceutical drug case were filed in

state A, a user in state B should not be compelled to hire a lawyer to determine whether or not he should opt out.

II. EXPANSION.

The number of class actions following immediately upon the adoption of the rule was small. That is no longer the case. The number now runs into the low thousands. As the cases become bigger, the number of cases closed declines, so that there are an ever-larger backlog. We are now in the era of the billion dollar or several billion dollar aggregate actions; some big ones are Agent Orange, Dalkon Shield, and DES. Some of these big cases have been class actions, while others have been pulled together under the multi-district panel system. The common areas are torts, antitrust cases, securities cases, and RICO or consumer fraud cases.

III. PROBLEMS.

A. The Fix.[2]

Quite clearly the fear of some, of whom this writer was definitely one, was that the rule would invite trouble by giving prospective defendants an opportunity to rig classes which might be cheaply bought out. The 1963 spectre has not, in fact, arisen to haunt the system. This phase of the federal district courts becoming merchants in the sale of res judicata has not occurred.

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[2] In this section, I am reporting on the commercial and tort cases, not the "good cause" cases, such as the environmental actions.

But its cousin has. Potential defendants have not had to create phony cases. The "take a dive" plaintiff class has instead been empowered by the attorney who purports to represent the class – the attorney for the fair and adequate representative according to the rule – who is prepared, in effect, to take a bribe in which he gets a lot and the members of the class get very little. Such arrangements are also called "sweetheart settlements with defendants, trading a portion of the compensation due victims for a premium on, or merely the certainty of, the fee recovery." D. Rosenberg, *Class Actions for Mass Torts*, 62 Ind. L.J. 561, 583 (1987).

For want of statistical evidence, one must become anecdotal, and I report from anecdote that this phenomenon exists. As § 3042 of the Manual for Complex Litigation Second (sometimes called by the judges the Complex Manual for Litigation) recognizes, "counsel for the parties are the main source of information concerning the settlement." Of course the judge should review the settlement and of course there should be opportunity for protest, but with the backlog of thousands of class actions pending, with presumably all of them before very busy judges, and with judges bringing uneven levels of ability to the task – not all of them are a Judge Pointer or Judge Weinstein or Judge Higginbotham – settlements can be perfunctorily swept through.

A recent illustration of an extraordinarily meticulous fee study is that of Judge William Browning in a $600 million matter, largely though not entirely affirmed after close thought in *Washington Pub. Power v. City of Seattle*, 1994 W.L. 90327 at 9 (9th Cir. Mar. 23, 1994). This was a seven-and-a-half-year case. It took a law clerk one year,

full time, to analyze the fee claims and the judge over three weeks to utilize the data and reach his result. As is observed in a very substantial Stanford Law Review article, judicial review of the records in a big case "seems a positively breathtaking waste of an article III judge's time," and this review usually results in "a few generalities about the uncertainty of recovery" and a contingency multiplier. J. Alexander, *Do the Merits Matter?*, 41 Stan. L. Rev. 497, 578-79 (1991). As has been said in a very constructive analysis, "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." J. Coffee, *Plaintiffs' Attorneys in Class Actions*, 86 Col. L. Rev. 669, 677 (1986).

This does not, by any means, always happen. A splendid example is of a large securities fraud case pending in the district court in Louisiana. A settlement was negotiated in which the security holders would receive 1.7 cents return on each dollar invested, minus 25 percent for legal fees, essentially a penny on the dollar. The net return to the investors, in short, was slightly over one percent and counsel fees were proposed to be $7 million.

This one was gross enough to raise a howl and a national television program highlighted it. This led to a protest. The judge did take steps to reject the proposal and a later, different and fairer settlement was worked out. But in most settlements, there is no television coverage and the sense of scandal is not large enough, nor the potential awards great enough, to engender an effective protest.

As this thought has been politely put, "Because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class." Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985). Without any venality, but simply as a matter of business judgment, as Judge Friendly has observed, the attorney may have an advantage in taking a smaller settlement bearing a higher ratio to the cost of work than a larger settlement obtained after extensive discovery, trial and appeal. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972).

The hazard of this conduct was greatly increased by the United States Supreme Court decision in the matter of *Jeff D. v. Evans*, 475 U.S. 717 (1986). It had previously been the rule in some circuits – the lead case was from the Third Circuit, *Pandrini v. National Tea Co.* 557 F.2d 1015, 1021 (3d Cir. 1977) – that the settlement on the merits and the determination of legal fees must be truly separate episodes so that the merits would be determined at one time and the legal fees at another and later time. This reduced the bribery potential. But the Supreme Court in *Jeff D.* held that both of these matters could come on at once, so that the defendant could settle with the class and settle with the lawyer simultaneously.

I strongly recommend that legislation reverse *Jeff D.*

This has not improved the returns to the classes. As Professor Kane has observed with respect to settlement proposals which "explicitly provide for large attorney's fees, . . . the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fee

application because, having reached a settlement, the class opponents have no interest in how the fee issue is resolved." M.K. Kane, *Of Carrots and Sticks*, 66 Tex. L. Rev. 385, 398 (1987). Moreover, as the Ninth Circuit has observed, "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Washington Pub. Power v. City of Seattle, supra.* For another discussion of "the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class," *see* L. Grosberg, *Class Actions and Client-Centered Decision Making*, 40 Syracuse L. Rev. 709, 776 (1989). Let me be very explicit. Nothing in this aspect of the fee problem makes the defense attorney look any better than the plaintiff's attorney.

B. Fees.

We have no clear-cut analysis of the extent to which Rule 23 deserves the title occasionally given to it in casual talk among lawyers as the Lawyers Relief Act. The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory. This Relief Act aspect of course cuts in both directions because the defense bar must also be paid a sizeable sum for its efforts to keep the recovery down. As is developed elsewhere, "the paramount motivation for such litigation [is] counsel's desire to generate substantial fees." Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 Del. J. Corp. L. 671

(1984), citing *Zeffiro v. First Pennsylvania Bank*, 581 F. Supp. 811, 813 (E.D. Pa. 1983).

The result by the 1980s and the present time, by way of historical development, has been oft times to create a giant churn. The plaintiffs' lawyers are busy, the defendants' lawyers are busy, the courts are busy, and the cream that should rise to the top from all of this churning is frequently only a drop or two for those whom Rule 23 was designed to benefit. For a strenuous attack on counsel fees, *see* J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991), giving one illustration of a thousand dollar an hour fee. The article also illustrates the use of special masters as judges try to take control of the detailed analysis of some of these claims.

The common argument in favor of allowing class actions to proceed with pittance returns to the beneficiaries is that this serves as a social regulatory mechanism and helps to avoid future abuses of the general public. Collateral to this is the argument that at least some of these cases are brought by organizations generally well regarded for good works in behalf of consumers or other beneficiaries and that the fees helped to sustain such organizations. However, there has never been a mediated analysis as to whether this form of social regulation for consumers or the environment is better handled by government agencies or by the courts, nor whether the burden on the court system over-balances the value of this indirect form of social legislation and administration.

A different solution to the minuscule recovery and the large fee is the concept of "fluid recovery." The development of this device, largely in the past fifteen years, is set out in J. Solovy and others, *Class Action Controversies* at 140-42 (1994). For example, when members of the class would get only two dollars a piece, the only winners are likely to be the attorney and, oddly enough, the defendant because nobody applies for these small amounts and the defendant gets to keep the money. Under the developing notion of fluid recovery, there are other forms of charge without any effort to get anything to the individual plaintiffs. Illustrations are price rollbacks, coupons, and other devices; for discussion, *see* G. Hillebrand and D. Torrence, *Claims Procedure in Large Consumer Class Actions,* 28 Santa Clara L. Rev. 747 (1988).

I attach as Exhibit B a summary of what appear to be abuses, as well as a couple of recent stories from *The National Law Journal* and *The Wall Street Journal* involving the problem of token for the class member and great wealth for the representative.

C. The Class Representation.

1. Who is the representative?

The rule assumed that there would be an honest to God plaintiff or plaintiffs as true representatives of the class. That has become a fiction; the class representative "has been reduced to a little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions." J. Bums, *Decorative*

Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165, 166 (1990).

The only close analysis in the literature strongly suggesting that no plaintiff is representing the class is the Alexander study in the Stanford Law Review, supra, analyzing nine settlements in securities cases. The stakes in those cases range from $19 million to $95 million. The percentage settlement in seven of those cases range from 20 percent of the stake to 27 percent and four of them are within a two-point spread. The merits of those claims had nothing whatsoever to do with the settlements; the merits could not be so interchangeable. These are cases in which officers and directors are named as defendants and strongly suggest that settlements are made with corporations to get the insiders off the hook.

2. The race for the gold.

The most visibly distasteful aspect of class actions is the race by attorneys to grab the first class claims and thus get to be lead counsel or at least on the steering committee. The ashes from the great fire will not be cold and the corpses barely at the mortuary before someone will have filed a class action; having found one person, dazed but alive, or one widow, the attorney quickly files the action. There is no actual representation of a class at all.

From there on out, the case is churned to warrant more fees. There are cases where the defendant would settle immediately, but is not given the chance.

The development described here is anecdotal and not statistical, but the anecdotes come on high authority. To write this paragraph I have consulted four past presidents of the American Trial Lawyers Association, the number one group of plaintiffs' lawyers. They are unanimous that this practice exists and that it is disgusting; they refer to these speed artists as "The Parachutists." This historical development, they believe, brings shame to the Bar and particularly to their great division of it.

IV. ILLUSTRATION OF CLAIMED SUCCESSES.

Very responsible groups do not share my views on (b)(F). One of those groups is the Alliance for Justice, of which I am a director and ~~for~~ which I have enormous respect. I, therefore, insert here as a balance to my own views – though I am not myself persuaded – the views of the Alliance for Justice on this point, Exhibit C.

V. *AMCHEM.*

Judge Edward Becker of the Third Circuit Court of Appeals, whose opinion is largely affirmed in the important opinion by Justice Ginsburg in *Amchem* at the last session of the Supreme Court, has put a needed major rein on the abuses of settlement classes. The Ginsburg opinion reminds us that Rule 23 sets its own limitations and is to be followed; she puts a sharp check on the endless expansion of the rule by judicial application. She also lays down important restrictions on classes generally and on settlement classes in particular.

VI. RECOMMENDATIONS.

The Congress must decide to what extent it wishes to reconstruct Rule 23 by legislation and to what extent it wishes to leave this to the Rules Committee structure. I personally believe that the rule has become so abusive that running reform on double track is a good idea, and some portions of what is necessary would in any case require congressional action. Specifically:

A. The Approach.

I approach this topic from the liberal standpoint, and have no reluctance about social engineering through law. But the rules structure was not created to make the rules committee into social engineers. If social changes are desired, the Congress and the Executive department through its agencies should take the responsibility of policy and enforcement. I am wholly persuaded of the view expressed by Judge Paul Niemeyer, the present Chairman of the Civil Rules Committee of the Judicial Conference in his response to the parallel Senate committee on this subject. He was asked whether he thought it desirable for Rule 23 to be used as a social tool to enforce laws through attorneys essentially acting as private attorneys generally:

> I believe that Rule 23 was never intended to be a tool to enhance enforcement of substantive claims. Rather, I believe, it was designed as a procedural device to facilitate the aggregation of claims for judicial efficiency. Others, however, believe that while judicial efficiency may have been the original intent of Rule 23, the rule has

> transformed by use into a mechanism to enhance substantive enforcement with the result that it actually supplements or even displaces government regulation. While there is plenty of evidence to support this observation, if it were to be legitimized as a purpose for Rule 23, such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude that it is too anarchial to authorize private attorneys to self-appoint themselves as enforcers of laws without adequate accountability to the lawmakers or to the public.

Response to Senator Grassley, December 16, 1997, Question No. 2.

B. Removal.

The Judicial Code should be amended to permit removal of class actions from state courts whenever an industry involved in interstate commerce is involved. Since John Marshall's time, it has been the interpretation of the diversity statute that there must be total diversity in order for a case not involving a federal question to be in the federal courts. In the famous case of *Strawbridge v. Curtis*, the Chief Justice made clear that this was a matter of statutory interpretation and not constitutional necessity. While most courts can handle class actions perfectly well, we cannot blink the fact that there have been some gross abuses where an obscure state court gives res judicata effect to a settlement which binds the entire United States.

C. Codify *Amchem*.

In my view, settlement classes should be abolished; but if we are to have them, then they should, as the Supreme Court has made very, very clear, be held to the same standards as would be a full-scale adversary class action proceeding. I would codify the *Amchem* case to provide that in considering a proposed settlement class, § 23(b)(3)(D) is inapplicable; heightened scrutiny is required as to 23(a)(4) and the other provisions of Rule 23 apply equally to settlement class actions, as well as to all other class actions. The elimination of (3)(D) means that the court will not need to consider "the difficulties likely to be encountered in the management of a class action" because, as Justice Ginsburg sensibly said, if the matter is going to be settled, there isn't going to be any management anyway.

The provision for heightened scrutiny of the (a)(4) element is the insistence that the court look with great care at whether "the representative parties will fairly and adequately protect the interests of the class." *Amchem* makes this of special importance because, to put it bluntly, it is in the settlements that the lawyer may sell out the class for the sake of his pocketbook. In all other respects, the settlement class should have to meet the requirements of all other classes.

D. The Opt-Out.

In matters in which it appears that the recovery of individual members of the class, as distinguished from their counsel, is likely to be small, the proceedings should

go forward as a class only if the proposed members affirmatively, after notice, express a desire to be included in the action. "Opt-in" should be substituted for "opt-out." The object is to take the romance out of class actions in which putative class members have no wish to be involved. It will take the burden off the court by determining this matter early instead of after extended procedures.

E. Settlement and Fees.

The earlier Third Circuit rule should be made national if there is to be settlement; the fees should be independently considered.

F. "Fluid Recovery."

"Fluid recovery" (that is nothing to the class and some general *bonanza* to some public interest) should never be allowed. I refer to such devices as an order which gives nothing to the class but which provides that the defendant dairies should lower the price of milk by two cents a quart for a given period of time. Nothing in the Constitution, the Code, or the rules makes the courts proxies for the appropriation committees of Congress or makes them specialized tax collectors for public purposes.

VII. CONCLUSION.

I conclude by attaching as Exhibit D a letter received by me from Justice Hugo L. Black of the United States

Supreme Court in 1969. Rule 23(b)(3) was a mistake from the beginning and I take some comfort from the fact that so distinguished a person was of the same point of view.

John P. Frank

LEWIS AND ROCA LAWYERS

Areas of Practice:

Mr. Frank is a partner in the firm's Special Litigation Group. His extensive experience includes the areas of appeals, civil litigation and antitrust. Prior to joining the firm in 1954, Mr. Frank served as Law Clerk to Mr. Justice Hugo L. Black during the October 1942 term of the United States Supreme Court. He also was Assistant Professor of Law at Indiana University from 1946-49 and Associate Professor of Law at Yale University from 1949-54 and during that time was associated with the Antitrust Division of the United States Department of Justice.

In 1991, Mr. Frank was named for the third time to the *National Law Journal's* list of the "100 Most Influential Lawyers in America." He is also listed in the current (1996-97) edition of *Best Lawyers in America.*

Mr. Frank has been involved in more than 500 appeals in his years with the firm. These include many cases at the Arizona Court of Appeals, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, other federal circuits, and the United States Supreme Court. A recent appeal concerned the premium required to be paid by physicians at the University of Arizona Medical School for malpractice insurance and resulted in client savings of over seven million dollars. He continues to be active in state trial courts and federal district courts, where he has represented the motion picture industry in antitrust litigation, has recently represented a newspaper on antitrust and contract issues, and is currently representing an air

tanker contractor in federal district court litigation on an issue of whether certain planes were properly acquired.

Mr. Frank is frequently called upon for opinions, as for example, the water rights of an Arizona Indian tribe. His professional work is entirely occupied with litigation in a variety of forums, in legal matters either in anticipation of litigation or seeking to avoid litigation.

Professional Activities:

Mr. Frank is a member of the Maricopa County Bar Association, the State Bar of Arizona and the American Judicature Society. He is on the Council of the American Law Institute and is a Fellow of the American Bar Foundation.

From 1960-70, Mr. Frank was a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and continues to meet regularly with it; a member of the Arizona Salary Commission from 1970-82; and a member of the Arizona Appellate Court Nominating Committee from 1972-84 and chairman of the nominating commission for the U.S. Court of Appeals, 9th Circuit (Southern) from 1977-1980.

Mr. Frank serves as general counsel to the Arizona Democratic Party. He is a Director for the Alliance for Justice (headquartered in Washington, D.C.) and a member of the Senior Advisory Board for the Ninth Circuit of Appeals. A former board member of the Phoenix Art Museum, he is very active in pro bono litigation.

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(B.A., 1938; M.A., 1940; L.L.B., 1940); Yale University (J.S.D., 1947). Awarded L.L.D., by Lawrence University, 1981, Order of the Coif. Recipient, Harley Award, 1984. Author and Editor: "Cases and Materials on Constitutional Law," Callaghan & Co.; "Cases on the Constitution," McGraw-Hill; "Mr. Justice Black," Alfred A. Knopf, Inc.; "Marble Palace, The Supreme Court in American Life," Alfred A. Knopf, Inc.; "Lincoln as a Lawyer," University of Illinois Press; "Justice Daniel Dissenting," Harvard University Press; "The Warren Court," The MacMillan Co.; "American Law: The Case for Radical Reform," The MacMillan Co.; "Clement Haynsworth, the Senate, and the Supreme Court," University Press of Virginia. Assistant Professor of Law, Indiana University, 1946-1949; Associate Professor of Law, Yale University, 1949-1954. Law Clerk to Mr. Justice Hugo L. Black, October, 1942, term. Member, Committee on Rules of Practice and Procedure of the Judicial Conference of U.S., 1959-1970. Member: Arizona Salary Commission, 1970-1982; Arizona Appellate Court Nominating Committee, 1972-1984. Chairman, Merit Selection Committee, U.S. 9th Circuit, South, 1977-1979. *Member:* American Law Institute (Member, Council, 1973-); American Judicature Society. Fellow, American Bar Foundation. *Appeals. Civil Litigation. Antitrust.*

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Hugo L. Black, 1942; asst. to sec. interior, 1943, to atty. gen., 1944-45; asst. prof. law Ind. U., 1946-49; assoc. prof. law Yale U., 1949-54; vis. lectr. U. Wash., 1966, U. Ariz., 1967, Ariz. State U., 1969, 72: mem. firm Covington & Burling, Washington, 1947, Arnold & Porter, Washington, 1948, 53, Lewis and Roca, Phoenix, 1954 –; mem. adv. com. civil procedure Jud. Conf. U.S., 1960-70: mem. exec. com. Adv. Com. on Appellate Justice, 1970-73. Democratic precinct committeeman, 1956; counsel Ariz. Dem. Com., 1962-65, 78-83. Mem. ABA, Am. Law Inst. (council), Am. Bar Found., Maricopa County Bar Assn. Clubs: Arizona, University (Phoenix). Author: Mr. Justice Black, 1949; Cases on Constitutional Law, 1950; Cases on the Constitution, 1951; My Son's Story, 1952; Marble Palace, 1958; Lincoln as a Lawyer, 1961; Justice Daniel Dissenting, 1964; The Warren Court, 1964; American Law: The Case for Radical Reform, 1969; contbr. articles to profl. jours. Federal civil litigation. State civil litigation. Home: 5829 E Arcadia Ln Phoenix AZ. 85018 Office: 40 N. Central Phoenix AZ. 85004-4429

Front Pay for Odie Fields
Computed for the Period 1/1/95 – 12/23/07
Reinstated at Grade 02, Step 07

Year	(1) Jan Salary	(2) 894 Adjustment	(3) Promotion or Step Increase	(4) Dec Salary	(5) Present Value
1995	$64,447	----------	$1,933	$66,380	$60,305
1996	$66,380	$2,522	$1,991	$70,893	$59,865
1997	$70,893	$2,694	$2,052	$75,639	$59,366
1998	$75,639	$2,874	$2,112	$80,626	$58,814
1999	$80,626	$3,064	$2,176	$85,865	$58,212
2000	$85,865	$3,263	$2,507	$91,635	$57,609
2001	$91,635	$3,482	$2,317	$97,434	$57,047
2002	$97,434	$3,703	$2,386	$103,523	$56,326
2003	$103,523	$3,394	$2,457	$109,914	$55,572
2004	$109,914	$4,177	$2,211	$116,302	$54,752
2005	$116,302	$4,419	$6,311	$127,032	$54,248
2006	$127,032	$4,827	$0	$131,859	$54,322
2007	$131,859	$5,011	$0	$136,870	$52,369

Total: **$738,806**

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